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Supreme Court, U.S.
FILED

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WRIT NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

On PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLATE CASE NUMBER: 03-20541

DON R. DAVIS, SR. AND LINDA L. DAVIS
PLAINTIFFS / APPELLANTS
V.
BRAZOS COUNTY TEXAS,
County Judge Alvin Jones, County Commissioners Court; Bill Turner, Individually and as District Attorney; Douglas Howell, Individually and as Assistant District Attorney; Margaret Lalk, Individually and as Assistant District Attorney; Department Of Community Supervision
John Delaney, Individually
TEXAS A&M UNIVERSITY,
Dr. Ray Bowen, President; Robert Wiatt, Individually and as Director Of Traffic And Security; James Lindholm, Individually and as University Police Detective
TEXAS DEPARTMENT OF PUBLIC SAFETY,
Col. Thomas Turner Davis, Director; Texas Ranger David Hullom, Individually and as D.P.S. Officer,
FBI Special Agent Robert Johnson,
DEFENDANTS / APPELLEES

PETITION FOR WRIT OF CERTIORARI

Don and Linda L. Davis,
Petitioners pro se
5901 Lake St.
Houston, Texas 77005
713-839-8382

PETITION FOR WRIT OF CERTIORARI

COMES NOW Don R. Davis Sr. and Linda L. Davis, Petitioners, to respectfully ask the Honorable Court to grant WRIT OF CERTIORARI pursuant to Supreme Court Rules 10-14 and would show to the Honorable Court the following:

QUESTIONS PRESENTED FOR REVIEW

QUESTION PRESENTED FOR REVIEW NO. 1: Can a citizen expect their federal courts to act to protect their constitutional rights when presented with credible allegations of violation of due process?

REASON FOR REVIEW: The refusal of the District Court and the Fifth Circuit Court of Appeals to rule on the substance of Petitioners' claims abrogates the intent of 42 USC §1983 and the directives of this court. *Supreme Court Rule 10(a).*

QUESTION PRESENTED FOR REVIEW NO. 2: Does a citizen have constitutional protection from arbitrary government action as embodied in claims of malicious prosecution, abuse of process, and official oppression?

REASON FOR REVIEW: The Fifth Circuit Court refused to apply either the precedent set by this Court in *Albright v. Oliver*, 510 U.S. 266 or the Fifth Circuit in *Castellano v. Fragozo*, 352 F. 3d 939, 942 (5th Cir. 2003)(en banc) for assertion of constitutional claims necessitating an exercise of this Court's supervisory power. *Supreme Court Rule 10(a).*

QUESTION PRESENTED FOR REVIEW NO. 3: Is it a substantive due process violation for law enforcement officials to use family members as virtual hostages to attempt to coerce a fugitive's surrender?

REASON FOR REVIEW: The Fifth Circuit's refusal to make any ruling on the Petitioners' substantive due process claims sidesteps an important question of federal law that has not been, but should be, settled by this Court. *Supreme Court Rule 10 (b).*

Certificate of Interested Persons

Petitioners certify that the following listed persons and entities have an interest in the outcome of this case.
Solicitor General of the United States
Brazos County, TexasCounty Judge Alvin Jones, County Commissioners Court, Dept of Community Supervision
Bill Turner, District Attorney
Douglas Howell, Assistant District Attorney
Margaret Lalk Assistant District Attorney
John Delaney, individually
Texas A&M University
Dr. Ray Bowen, President
Robert Wiatt, Director of Traffic and Security
James Lindholm, University Police Detective
Texas Department of Public Safety
Col. Thomas Turner Davis, Director
Texas Ranger David Hullom, as D.P.S. Officer
FBI Special Agent Robert Johnson
State of Texas
Texas A&M University
John Cornyn Attorney General for Texas
Charles E. Hammond, III counsel for plaintiffs
Michael E. Holoway, counsel for plaintiffs
George J. Dick Stengel, Jr. attorney for Brazos County, Texas: County Judge Alvin Jones, Brazos County Commissioners Court, Bill Turner, Douglas Howell, Margaret Lalk and Brazos County Dept. of Community Supervision
W. Lance Cawthon, Assistant Attorney General, Philip E. Marrus, Assistant Attorney General, Don J. Clemmer, Acting Deputy Attorney General, Howard G. Baldwin, Jr., First Assistant Attorney General, attorneys for defendants, Delaney, Texas Department of Public Safety, Davis, Hullom, Bowen, Texas A&M University, Wiatt, and Lindholm

Andrew A. Bobb, U.S. Attorney's Office in Houston, attorney for Robert Johnson, FBI Special Agent
Leslie B. Vance, Office of the Attorney General representing Richard W. Davis

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STATEMENT OF JURISDICTION

Petitioners ask for review of the denial of their appeal to the Fifth Circuit Court of Appeals from the U.S. District Court for the Southern District of Texas. Petitioners' civil action under 42 USC 1983 was dismissed under Federal Rules of Civil Procedure 12(b)(6). Final judgment was entered July 13, 2004. The petition is filed in compliance with Federal Rules of Appellate Procedure and Supreme Court Rules 10-14.

STATEMENT OF THE CASE

Petitioners Don R. Davis, Sr. and Linda L. Davis brought suit under 42 USC §1983 as the only recourse available to them as citizens of the State of Texas to hold officials accountable for actions taken under the color of state law denying rights required of the State by the Fourteenth Amendment.

The U.S. District Court for the Southern District of Texas granted Defendants' motions for Failure to State a Claim, Judgment on the Pleadings, and Summary Judgment on behalf of the *Biven*'s[1] claims against F.B.I. Special Agent Robert Johnson. *CIVIL ACTION NO. H-01-1613.*

The District Court signed off on proposed orders of dismissal written by attorneys for the Defendants. The court did not address specific claims against individual defendants or give factual delineation for granting or denying qualified immunity for individual defendants. Nor was there ruling of law regarding the substance of constitutional or state law claims. The orders included

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[1] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

sweeping assertions of general immunities, many of which were incorrect statement of the law of the case. The Court declined to give its reason for denial of the Petitioners' claims for tolling of the statute of limitations as allowed by Texas law.

Finally, the District Court on March 31, 2003 entered a Final Judgment in favor of Defendants and against Plaintiffs, dismissing all claims. Notice of Appeal on May 23, 2003 was filed perfecting an appeal to the Fifth Circuit Court of Appeals.

The facts of the case were stated in Appellants' Brief, and restated referencing specific record pages in the Reply Brief (included in Appendix to this petition). The case was reviewed by the well-established screening process and scheduled for oral argument, over the objection of the Appellees. *F.R.A.P. Rule 34(a)(2).* One week before argument, the assigned panel cancelled argument to rule on the record and briefs.[2] The *per curiam* opinion of the Fifth Circuit defined the rulings as Failure to State a Claim under Rule 12 (b)(6). The panel erroneously interpreted the record and the orders of the District Court as having no assertion of facts. *Davis v. Brazos County, et al,* No. 03-20541, May 10, 2004.[3]

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[2] Although the opinion states that the record in total was reviewed, the docket sheet shows that only one volume of nine was reviewed. Volume 4 did not include the Rule 7(a) replies referenced in the Statement of Facts. See Docket Sheet, Appendix

[3] The District Court order plainly states: This Court previously ordered Plaintiffs to amend their complaint in light of Defendants' initial motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs complied by filing their second amended complaint. Pursuant to a subsequent order, Plaintiffs also filed a Rule 7(a) Reply to the Defendants' assertion of qualified immunity. **Therefore, Plaintiffs' second**

On Petition for Rehearing, Petitioners requested that the misapprehension of fact be corrected in accordance with F.R.A.P. Rule 40. The panel's denial without comment refused ruling on which portion of the record was considered or give reasons that the statements of facts were considered inadmissible. *Order Denying Petition for Rehearing,* July 13, 2004.

Judgment was entered on July 13, 2004. The panel again denied without comment the Plaintiffs' Motion for Clarification of their ruling August 6, 2004.

Argument and Authorities

QUESTION PRESENTED FOR REVIEW NO. 1: Can a citizen expect their federal courts to act to protect their constitutional rights when presented with credible allegations of violation of due process?

REASON FOR REVIEW: The refusal of the District Court and the Fifth Circuit Court of Appeals to rule on the substance of Petitioners' claims abrogates the intent of 42 USC §1983 and the directives of this court. ***Supreme Court Rule 10(a).***

Petitioners Don R. Davis, Sr. and Linda L. Davis brought suit under 42 USC §1983 for claims, not of isolated improper acts of law enforcement and state officials, but the systematic and intentional abuse of their substantive rights to due process and repeated infliction of harm that

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amended complaint and Rule 7(a) Reply currently constitute Plaintiffs' live pleadings. *Order granting Judgment on the Pleadings, ROA 99, p. 3, n. 3.(emphasis added).*

constitute malice and official oppression so egregious to meet the standards of offense to justice and decency. The actions of the defendants are taken under color of law, in deliberate abuse of their formidable authority to prosecute and punish Don and Linda Davis for the illegal purpose of coercion. Petitioners ask that the Court review the allegations in total to determine that they cannot be held to comport with due process and the intent of 42 USC 1983.

The Fifth Circuit's refusal to rule on the substantive issues of this case is based solely on their misinterpretation of the record and the order of the District Court. In conflict with Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure, in defiance of their own precedents, this constitutes in itself a violation of due process. *F.R.C.P. Rule 7(a), Rule 12 (b)(6), F.R.A.P. Rule 34(a)(2).* The Petitioners ask this Court to review the procedural bars used to deny the intent of §1983.[4]

In repeated precedents[5] it had been stated policy of the Fifth Circuit to disapprove of such dismissal, upholding the standard of this Court that "a complaint should not be dismissed for failure to state a claim unless it appears **beyond doubt** that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957) (emphasis added).

Petitioners further assert that this standard of proof must be applied to the imposition of affirmative defenses of

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[4] See F.R.A.P. 34(a)(2) and Fifth Circuit Rules as cited *e.g., George W. Bennett Bryson & Co. v. Norton Lilly & Co.* , 502 F.2d 1045, 1050 (5th Cir. 1974).

[5] see e.g. *Kaiser Aluminum & Chem. Sales, Inc. v Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983)).

qualified immunity and statute of limitations. Because of the erroneous finding that there were no facts, the panel opinion further refused to address the tolling of the statute of limitations recently reiterated by this Court in *Jones* et al. v. *R.R. Donnelly and Sons*, No. 02-1205, May 3, 2004).

The purpose of the Constitution, at least as understood by a citizen, is to protect individuals against arbitrary and malicious actions on the part of government. The precedents of this Court uphold the premise that the Due Process Clause of the Fourteenth Amendment "was intended to prevent government officials from abusing [their] power, or **employing it as an instrument of oppression**." *County of Sacramento v. Lewis*, 523 US 833,at 845 (1998).[6] (See also *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)). Since law enforcement and judicial officers are the ones wielding the formidable power of the State, they are the very ones who have the power to abuse the rights of due process.

The plain language of 42 USC §1983 give a citizen before the courts a reasonable expectation that their claims will be heard and findings of fact and rulings of law will determine the validity of their claims. Don and Linda Davis brought their claims to put before the federal courts policies and practices allowed by the State of Texas to deny rights of due process. The hearing of their claims would hold officials accountable for unconstitutional and arbitrary actions.

The refusal to address the substance of their claims by the U.S. District Court for the Southern District of Texas and the Fifth Circuit Court of Appeals gives the courts' implied sanction of these policies and actions. The Petitioners ask

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[6] (citing Bank of *Columbia v. Okely* 17 US 235,4 Wheat.235-244(1819)(in turn citing the *Magna Carta*)).

this honorable Court to review the case on its substantive issues to determine that the credible allegations cannot be condoned as meeting the requirements of due process, and that it is incumbent on the federal courts to enforce the provisions of 42 USC §1983 (and 18 USC §241 and §242) when brought before them.

In *Castellano v. Fragozo*, the precedent set by the Fifth Circuit for claims regarding malicious prosecution, the Court states:

> The United States Supreme Court has made clear that Congress created a species of tort liability with 42 U.S.C.. § 1983. As the court observed in *Cary v. Piphus*:
>
> Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisite for their recovery, provide the appropriate starting point for the inquiry under *§ 1983* as well. Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.
> *Castellano v. Fragozo*, 352 F. 3d 939, 942 (5th Cir. 2003)(en banc)(emphasis added) citing *Carey v. Piphus*, 435 U.S. 247 (1978).
>
> The United States Court of Appeals for the Fifth Circuit finds no reasoned basis for concluding that §1983 is **never** available to remedy injuries wrought by a denial of due

> process. The countervailing interests of law enforcement have been weighed in the judicial development of the immunity doctrine, not in somehow sidestepping the congressional command of §1983.
> *Castellano v. Fragozo*, 352 F. 3d 939, 942 (5th Cir. 2003)(en banc)(emphasis added) .

The Petitioners ask the Court to review the simple facts of the case to determine whether it is inequitable under standards applying to §1983 claims that these cases deserve the attention of the courts while the Petitioners' is barred by procedural error. Petitioners respectfully ask the Court to grant Writ of Certiorari to ensure the equitable application of precedents. *Sup.Ct. Rule 10(a).*

QUESTION PRESENTED FOR REVIEW NO. 2:
Does a citizen have constitutional protection from arbitrary government action as embodied in claims of malicious prosecution, abuse of process, and official oppression?

REASON FOR REVIEW: The Fifth Circuit Court refused to apply either the precedent set by this Court in *Albright v. Oliver*, 510 U.S. 266 or the Fifth Circuit in *Castellano v. Fragozo*, 352 F. 3d 939, 942 (5th Cir. 2003)(en banc) for assertion of constitutional claims, necessitating an exercise of this Court's supervisory power. *Supreme Court Rule 10(a).*

Don R. Davis, Sr. and Linda L. Davis brought suit in U.S. District Court for violations of criminal due process by law enforcement and District Attorneys in Brazos County, Texas. In the case at bar, the Fifth Circuit ruled that the Davises "failed to allege specific violations of any clearly

established constitutional rights." *Davis v. Brazos County, et al, Panel Op. 3.*

However, simple reading of the factual claims demonstrates that they squarely meet the extensive discussions in all of the opinions, concurring and dissent, in *Albright v. Oliver*, 510 U.S. 266, for claims under the Fourth Amendment. Further, the Appellants' Brief delineates procedural and substantive due process claims under the Fourteenth Amendment, and pendant state tort claims, as outlined in *Castellano*. The Davises' appellate brief used specific facts to establish the essential elements of a malicious prosecution claim. *Appellants' Brief, pp. 44-46.*

This claim, viewed in light of the Fifth Circuit's blanket ruling that the Davises failed to allege violations of any "*clearly established constitutional rights.*" (*Panel Op.*, supra), the panel opinion can be seen as a tacit application of the Fifth Circuit's recent opinion in *Castellano v. Fragozo*, 352 F. 3d 939, 942 (5th Cir. 2003)(en banc), holding the malicious prosecution alone is no violation of the United States Constitution." *Id.*, at 942 (internal quotation marks omitted). With exhaustive discussion, the *Castellano* opinion notes that this ruling conflicts with its various sister Courts of Appeals. *Id.*, at 949-953.

The Fifth Circuit Court, citing *Albright* and *Buckley v. Fitzsimmons,* 509 US 259,260(1993) extends those findings to make it definitive practice of their jurisdiction that a citizen does <u>not</u> have a constitutional right to be free of malicious prosecution.

This decision, and its tacit application in the case at bar, also significantly distinguishes this Court's landmark opinion in *Albright*. The opinion leaves open the question of whether this Honorable Court will choose to extend the

findings in *Albright* [7] of Fourth Amendment claims to include malicious prosecution.

Under either standard, the facts and constitutional claims of this case meet the standards of both *Albright* and *Castellano* for pleading. Petitioners ask that the Court consider the factual allegations of this case in their entirety (see Appendix A) as to whether they can be considered to "comport with the intent of the Due Process clause" as outlined by the Fifth Circuit in *Castellano.* The allegations of this case, in fact, closely mirror those of *Buckley v. Fitzsimmons,* used as precedent in *Castellano.* Since *Castellano* was decided *en banc* while this appeal was before the Fifth Circuit Court, it is impossible to understand that the Court could overlook the same claims that the entire court had determined to be a definitive ruling on these cases involving malicious prosecution.

In addition to these landmark cases, in order to deny the Petitioners' appeal, the panel would have to determine that the facts did not support this Court's findings of *Buckley v. Fitzsimmons, Collins v. Harker Heights, County of Sacramento v. Lewis,* 523 US 833,at 845 (1998) and *Scheuer v. Rhodes,* 416 US 232,236,239,242-43(1974) as well as those Fifth Circuit precedents on immunities, conspiracy and statute of limitations (*Gordy v. Burns; Turner v. Upton County* ("*Turner I*"),915 F.2d 133,135 (5th Circ. 1990)), *Jones* et al. v. *R.R. Donnelly and Sons,* No. 02-1205, May 3, 2004).

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[7] See also *Gordy v. Burns* , 294 F.3d 722, 726 (5th Cir. 2002): "It remains unclear whether Albright will be extended to approve the constitutionalizing of malicious prosecution claims, see Kerr supra, (Jones, J. concurring), but the federal courts have so applied Albright."

Petitioners ask that the Court review the failure of the Court of Appeals to uphold precedents established by the Fifth Circuit and this Honorable Court. In the case at bar, because the Fifth Circuit's tacit application of *Castellano* conflicts with its various sister Courts of Appeals and significantly distinguishes this Court's decision in *Albright*, the Davises respectfully ask that the Writ of Certiorari be granted to resolve this conflict. *Sup.Ct. Rule 10 (a).*

QUESTION PRESENTED FOR REVIEW NO. 3: Is it a substantive due process violation for law enforcement officials to use family members as virtual hostages to attempt to coerce a fugitive's surrender?

REASON FOR REVIEW: The Fifth Circuit's refusal to make any ruling on the Petitioners' substantive due process claims sidesteps an important question of federal law that has not been, but should be, settled by this Court. *Supreme Court Rule 10 (b).*

As noted in Question No. 1, supra, the Fifth Circuit sidestepped any review of the Davises' specific constitutional claims based on the Court's holding that the complaint consisted of conclusory allegations lacking sufficient supporting facts, and that this ruling pointedly ignores the specific factual allegations contained in the Rule 7 Replies that the district court designated as part of the live pleadings. On this basis of insufficient supporting facts, the Fifth Circuit further held the Davises "failed to allege specific violations of any **clearly established** constitutional rights." *Davis v. Brazos County*, et al, Panel Op. 3 (emphasis added).

While (erroneously) disposing of the Davises' specific constitutional claims (of clearly established constitutional rights), the panel opinion fails to make any ruling on the

Davises' claim that the complained-of acts by the defendants rise to the level of a substantive due process violation insofar as the actions were a "cognizable level of executive abuse of power as that which shocks the conscience." *Appellant's Brief*, pp. 54-55 (quoting *County of Sacramento v. Lewis*, 523 US 833, 846 (1998)).

This substantive due process claim argued that the overarching theme of the defendants' wrongful actions was to abuse their power under color of State law to intentionally and wrongfully criminalize the Davises and inflict harm upon them in the public eye to use as "bait" to coerce the surrender of the Davises' fugitive son. *Appellants' Brief, p, 55.*

These complained-of actions included, but are not limited to: ordering under threat of jail that the Davises give interviews on national television that begged their son to surrender or else his father would have to go to jail *(ROA, 85; ROA 35, p. 323; ROA 90, p. 657)*; an assistant district attorney fraudulently posing as a grand juror and then enlisting two police officers to tamper with grand jury deliberations *(ROA 92, pp. 676-678, 681; ROA 90, pp. 654-55, pp. 659-61);* threatened to have both Davises forcibly committed to a mental institution if the judge refused to jail Mr. Davis after his son did not surrender *(ROA 90, pp. 657-58; ROA 92, pp. 673, 679, 682);* and destroyed audio tape evidence of a defendant making material admissions that would prove some of the Davises claims.*(Facts Referenced, ROA, p. 323).*

The above acts are but a sampling of specific facts the Davises claim were singly and collectively abuses of governmental power "employ[ed] as an instrument of oppression," *(Appellants' Brief, pp. 54-55 (quoting Lewis)),* thus qualifying as a substantive due process violation.

The Fifth Circuit's refusal to make any ruling on this substantive due process claim sidesteps an important question of federal law that should be settled by this Court; namely, do the substantive due process rights embodied within the Fourteenth Amendment protect citizens from being held as virtual hostages or harmed as "bait" to coerce a fugitive's surrender?

Based on the foregoing, the Davis respectfully request that this Court grant the Writ of Certiorari and review this important question of Federal law.

Conclusion

It has been Petitioners' belief since the nightmare began that their constitutional rights protected them; that the Fourteenth Amendment guarantees that no one will be deprived of life, liberty, or property without due process of law; that no citizen is to be charged with 'infamous' crime without the protection of the law; and the right to due process is 'absolute.' *Carey v. Piphus*.

In *Castellano*, the Fifth Circuit plainly states that this Court has made clear the rights of citizens to claims under §1983. The Fifth Circuit's own policy is thwarted by refusal to apply their own precedent.

Petitioners met the heightened pleading standard required by the Fifth Circuit for claims involving qualified immunity defense. (*F.R.A.P. 7(a)*; *see Schultea v. Wood* , 47 F.3d 1427, 1430, 1432 (5th Cir. 1995)(en banc)). These facts were then denied. Petitioners respectfully claim that in this case, the protection of law enforcement did lead to bias, and unfairly denied their right to have their case heard and a reasoned opinion given on the substance of their claims under precedents that applied to others, but not to them.

The Fifth Circuit *per curiam* opinion cites the claims as barred by the statute of limitations "even if valid." (*Panel Op 3*, supra). As the 'court of last resort' the Fifth Circuit has particular responsibility to ensure that valid claims of citizens before the court are fairly considered and there is equity and consistency in applying the law. Instead, the panel used procedural means to refuse meaningful ruling on this case in particular.

The District Court termed the allegations in this case "egregious". *(RR, Hearing 2)* It is egregiously improper, then, to refuse to address the issues, deny the Petitioners even the redress of fair hearing, and condone these policies by those entrusted to enforce the laws and the Constitution.

PRAYER

Petitioners pray that this Honorable Court will find that citizens do have rights imposed on the States in criminal due process and that these rights are not to be ignored or abrogated by the federal courts through procedures and immunities in favor of law enforcement or judicial economy. Don and Linda Davis respectfully ask the Court to review their petition and allow certiorari so that the substantive issues can be briefed and heard.

Respectfully submitted,

Don R. Davis, Sr.

Linda L. Davis, Petitioners pro se
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Houston, Texas 77005
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APPENDIX

Davis v. Brazos County, et al, Panel Op. 3

Denial of Motion for Rehearing

Denial of Stay of Mandate and Motion for Clarification

Statement of Facts as Presented in Reply Brief Appendix A Referenced to Docket Sheet, U.S. District Court Civil Action 01-CV-1613

Fifth Circuit Court Docket Sheet Appellate Case #03-20541
F.R.A.P. Rules 34, 35, 40 including Fifth Circuit Rules

Orders of Dismissal, USDC

Final Judgment, USCC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20541

FILED
May 10, 2004
Charles R.
Fulbruge III,
Clerk

DON R. DAVIS, SR., LINDA L. DAVIS
Plaintiffs-----Appellants

versus

BRAZOS COUNTY TEXAS; ET AL
Defendants

BRAZOS COUNTY TEXAS; ALVIN JONES, County Judge, County Commissioners Court; BILL TURNER, Individually, and as District Attorney; DOUGLAS HOWELL, Individually and as Assistant District Attorney; MARGARET LALK, Individually, and as Assistant District Attorney; JOHN DELANEY, Individually, Department of Community Supervision; TEXAS A&M UNIVERSITY; DR. RAY BOWEN, President; ROBERT WIATT, Individually, and as Director of Traffic and Security; JAMES LINDHOLM, Individually, and as University Police Detective; TEXAS DEPARTMENT OF PUBLIC SAFETY; THOMAS DAVIS, Colonel, Director; DAVID HULLOM, Individually, Texas Ranger and DPS Officer; ROBERT JOHNSON, FBI Special Agent; DEPARTMENT OF COMMUNITY SUPERVISION
Defendants ---- Appellees

Appeal from the United States District Court
For the Southern District of Texas, Houston
4:01cv1613

Before DAVIS, BENAVIDES, AND PRADO, Circuit Judges.

PER CURIAM:*

Appellants Don Davis, Sr., and Linda Davis filed suit against Appellees for alleged violations stemming from criminal prosecutions brought against them. Appellants appeal from the district court's dismissal of their claims against various Appellees. After reviewing the record and the briefs submitted by the parties, we affirm the judgment of the district court for the following reasons.

1) Appellants' complaint consists of conclusory allegations lacking sufficient supporting facts. *See Elliott v. Foufas*, 867 F.2d 877, 881 (5th Circ. 1989)("In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations.").
2) Even assuming Appellants have pleaded valid claims, the statute of limitations would have barred such claims. Appellants failed to adequately allege a conspiracy; their allegations that Appellees conspired to violate their constitutional rights are conclusory and insufficient. *See Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Circ. 1982)("Mere conclusory allegations of conspiracy cannot, absent reference to material facts,

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* Pursuant to 5TH Cir.R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

survive a motion to dismiss."). Moreover, any potential claims arising from the criminal prosecutions against them occurred outside of the applicable statutes of limitations. Appellants' claims are, therefore, barred by the applicable statutes of limitations.

See TEX. CIV.PRAC. & REM. CODE §§ 16.002(a), 16.003(a)(2004).

3) Finally, because Appellants failed to allege specific violations of any clearly established constitutional rights, they failed to overcome Appellees' immunity defenses. As prosecutors, Appellees Turner, Howell, and Lalk are entitled to absolute immunity for their conduct "in initiating a prosecution and in presenting in the State's case," insofar as such conduct was "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976). To the extent these Appellees functioned as administrators rather that as officers of the court, they are entitled to qualified immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). The other government officials are also entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because Appellants failed to allege specific violations of any clearly established constitutional rights, they failed to overcome Appellees' qualified immunity. *See Nunez. V. Simms*, 341 F.3d 385, 387 (5th Circ. 2003)("The plaintiff's showing of a violation of a

clearly established constitutional right is a 'prerequisite' to overcoming the qualified immunity defense.")(*citing Martinez v. Tex. Dep't of Crim. Justice*, 300 F.3d 567, 576-77(5th Circ. 2002)). Appellants' failure to plead a violation of their federal rights also renders their claims against Brazos County unavailing. *See Becerra v. Asher*, 105 F.3d 1042, 1047-48 (5th Circ. 1997)("Without an underlying constitutional violation, an essential element of municipal liability is missing.")[1]

For these reasons, we affirm the judgment of the district court.

AFFIRMED

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[1] Although Appellants also assert that the district court erred in prohibiting discovery pending a ruling on Appellees' pending motions, we find no error. *See Vander Zee v. Reno*, 73 F.3d 1365, 1368-69 (5th Circ. 1996)("Even limited discovery on the issue of qualified immunity must not proceed until the district court first finds that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.") (internal quotation marks and citation omitted).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20541

FILED
Jul 13, 2004
Charles R.
Fulburge, III
Clerk

DON R. DAVIS, SR., LINDA L. DAVIS
Plaintiffs-----Appellants

versus

BRAZOS COUNTY TEXAS; ET AL
Defendants

BRAZOS COUNTY TEXAS; ALVIN JONES, County Judge, County Commissioners Court; BILL TURNER, Individually, and as District Attorney; DOUGLAS HOWELL, Individually and as Assistant District Attorney; MARGARET LALK, Individually, and as Assistant District Attorney; JOHN DELANEY, Individually, Department of Community Supervision; TEXAS A&M UNIVERSITY; DR. RAY BOWEN, President; ROBERT WIATT, Individually, and as Director of Traffic and Security; JAMES LINDHOLM, Individually, and as University Police Detective; TEXAS DEPARTMENT OF PUBLIC SAFETY; THOMAS DAVIS, Colonel, Director; DAVID HULLOM, Individually, Texas Ranger and DPS Officer; ROBERT JOHNSON, FBI Special Agent; DEPARTMENT OF COMMUNITY SUPERVISION

Defendants ---- Appellees

Appeal from the United States District Court

For the Southern District of Texas, Houston
4:01cv1613

ON PETITION FOR REHEARING

Before DAVIS, BENAVIDES, AND PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is
Denied.

ENTERED FOR THE COURT:

Signed by F. Prado
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20541

FILED
Aug 06, 2004
Charles R. Fulbruge III, Clerk

DON R. DAVIS, SR., LINDA L. DAVIS
Plaintiffs-----Appellants

versus

BRAZOS COUNTY TEXAS; ET AL
Defendants

BRAZOS COUNTY TEXAS; ALVIN JONES, County Judge, County Commissioners Court; BILL TURNER, Individually, and as District Attorney; DOUGLAS HOWELL, Individually and as Assistant District Attorney; MARGARET LALK, Individually, and as Assistant District Attorney; JOHN DELANEY, Individually, Department of Community Supervision; TEXAS A&M UNIVERSITY; DR. RAY BOWEN, President; ROBERT WIATT, Individually, and as Director of Traffic and Security; JAMES LINDHOLM, Individually, and as University Police Detective; TEXAS DEPARTMENT OF PUBLIC SAFETY; THOMAS DAVIS, Colonel, Director; DAVID HULLOM, Individually, Texas Ranger and DPS Officer; ROBERT JOHNSON, FBI Special Agent; DEPARTMENT OF COMMUNITY SUPERVISION
Defendants ---- Appellees

Appeal from the United States District Court
For the Southern District of Texas, Houston
4:01cv1613

Before DAVIS, BENAVIDES, AND PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of appellants to stay the mandate pending clarification of the denial of the Petition for Rehearing is Denied.

IT IS FURTHER ORDERED that the motion of appellants for clarification and review of the denial of the Petition for Rehearing to correct the misapprehension of fact as to the record that was the basis of the per curiam opinion is Denied.

Initialed by Davis, Benavides, Prado

APPENDIX

STATEMENT OF FACTS

On August 23, 1996 the Davises' son, Don Davis Jr. failed to appear for the docket call for his trial scheduled to begin on Monday, August 26. His parents, Linda and Don Davis Sr., appeared with Davis Jr.'s attorney in Brazos County and shared all requested assistance. *ROA 35 p. 323.*

Immediately after, District Attorney(DA) Turner called police officers Wiatt, Hullom, and Lindholm and prosecutors Howell and Lalk to a meeting. He informed them they would participate in the investigation into the capture of Davis Jr. under DA Turner's sole direction, rather than state police (DPS), FBI, or Gulf Coast Fugitive Task Force. As policy maker for Brazos Bounty, Bill Turner approved the participation of University police officers Wiatt and Lindholm as adjunct police officers outside their primary jurisdiction. DPS officer David Hullom acted in this case at the direction of Bill Turner. *ROA 92 p.675-76,678, 680-81; ROA 90 p. 652-53, 659-60.*

In the investigation that followed, Hullom and Lindholm traveled to Lake Charles, La. to investigate two trips taken by Linda and Davis Sr. in previous months and produced a false affidavit by a hotel worker that the Davises were not there; that it was Davis Jr. out of state in violation of his bond. *ROA 92 p.675-76,678, 680-81; ROA 90 p. 653, 659.* The Davis home was under surveillance, phone traps in place, and officers executed no less than two search warrants. No evidence was ever found that the Davises had contact with their son, knew of his whereabouts, or gave any others any suspicion that they knowingly helped their son flee. Within 5 days subpoenas were issued for the Davises to appear as Suspects before the grand jury in

Brazos County. *ROA 92 p.676,678, 680-81; ROA 90 p. 652-54, 657-8.*

Leading up to the grand jury, in blanket media coverage of the disappearance of Davis Jr., police officers presented theories of the case as fact and the media reported community outrage at the "lowering" of Davis Jr.'s bail bond by Judge Delaney.[1] *ROA 90 p. 658*

On Sept. 10, 1996 FBI agent Robert Johnson entered the case. Johnson conferred and cooperated with DA Bill Turner and Bob Wiatt and obtained a federal fugitive warrant on Sept. 11, 1996. *ROA 90 p. 654.*

On September 12, 1996 Linda and Davis Sr. appeared before the grand jury. *ROA 85 Testimony,* Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.* Officers Hullom and Lindholm testified to the (false)[2] affidavit as evidence the Davises were lying to the grand jury. Davis Jr.'s girlfriend, Beth St. John, corroborated the Davises' testimony.*ROA 92 p.675-76,678, 680-81; ROA 90 p. 653, 655, 659-60.*

In violation of the Code of Criminal Procedure, ADA Margaret Lalk was seated as a grand juror and allowed to

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[1] When Don Jr. was indicted, the media reported that the grand jury, purportedly outraged by the facts of the case, recommended a bond of $2million. Judge Delaney, not bound in any way by such a recommendation, set bond at $50,000 for each count, for a total bond of $150,000.

[2] This is not a conclusory allegation. The police later acknowledged the affidavit was false. In discovery during prosecution of the case, prosecutors produced the signatures that were clearly demonstrated to be those of Don Davis, Sr. All mention of this conspiracy was changed to charges that the parents had purposely attempted to 'leave a false trail' to confuse investigators.

pose questions as a grand juror. Throughout questioning, deliberations, and voting police officers Lindholm, Hullom, ADA Lalk and unknown others remained in the jury room.[3] *ROA 92 p.676-678, 681; ROA 90 p. 654-55, 659-61.*

On Friday, Sept. 13 Doug Howell notified the Davises of the indictment, requiring they submit to arrest in Bryan at 5:30 p.m. The Davises presented themselves for arrest, represented by counsel on conference call. The courtroom was filled with media. *ROA 85 Testimony*, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.*

The court was made aware of the health issues for Don Sr., and that due to the indictment, the school district Linda Davis worked for would require her to be put on leave, losing the only income for the family. Judge Delaney set the prosecutors' requested bond of $20,000 each and the Davises were taken into custody. *ROA 92 p.675-76,678, 680-81; ROA 90 p. 652-53, 659-60.*

FBI agent Johnson and an unidentified plain clothes officer rode in the elevator to the jail with the Davises; Linda Davis was in hysterics. Linda Davis screamed at the officers that neither she nor her husband would speak to them and their attorney instructed them to remain silent and speak to no one; at this point Davis Sr. remained silent. *ROA 90 p. 656.*

The plain clothes officer accompanied Linda Davis to the nurse's office. Agent Johnson requested a private room in which to interrogate Davis Sr. Throughout this case, the Defendants have never contradicted the Davises' assertion

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[3] This is a material issue of fact, as the police officers and Lalk first claimed to have not been present for voting, and in the record for this case, claimed to have left for deliberations.

that this interview was conducted at the direction of the head of the investigation DA Bill Turner.[4] In that interview, (while Linda Davis could be heard screaming down the hall) Johnson attempted to get Don Davis Sr. to confess he knew the whereabouts of his son and threatened the continued harm to the mental health of his wife if such information was not forthcoming. Johnson stated to Davis Sr. that he had the power to release his wife if Don Sr. would tell Johnson where Davis Jr. was, with Johnson telling Davis Sr., "you don't want to have to listen to that", referring to Linda Davis' continued screams. Davis Sr. told Johnson he would not talk to Johnson without an attorney. The interview continued along the same line of questioning.[5] *ROA 90 p. 656; ROA 85 Testimony*, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.*

While in custody, Linda Davis attempted to commit suicide. On Sept. 14, friends and family formed a collection to pay her bond and committed her to West Oaks Psychiatric hospital where she remained hospitalized for severe depression and suicidal ideation for 10 days. *ROA 85 Testimony*, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.*

Within two weeks, prosecutors purportedly sent a letter to Davis attorney Price Blalock offering to drop all charges against Linda Davis in return for a guilty plea from her husband. The letter states the offer is made with the knowledge of Linda Davis' precarious mental health and the threat posed to her employment. *ROA 90 p. 656-7; 60-*

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[4] Any contact between Johnson and the Davises in custody would have to be approved by Turner. Agent Johnson has taken the position that he had no jurisdiction over the Davis' case.

[5] This is a material issue of fact, as agent Johnson claims to have terminated the interview when Davis Sr. requested counsel.

61. From November 1996 to the trial date in May 1997 at each hearing, Davis Attorney Blalock pointed out the State had no evidence to turn over and no witnesses to call. Prosecutors propounded the entirely new theory of the case that intent to assist their son was demonstrated by the police assertion that the Davises went to Louisiana to create a false "paper trail" to mislead authorities away from Davis Jr.'s 'real' whereabouts[6], so acknowledging the affidavit was false and the Davises' testimony as truthful. *ROA 35 p. 323. Second Amended Pleadings.*

In January 1997, ADA Margaret Lalk relieved ADA Howell as prosecutor and rescinded the offer to drop charges against Linda Davis to the effect that the DA's office felt that it would reflect badly on them to "just let her [Linda Davis] go;" Lalk offered to allow Linda Davis to plead to a misdemeanor if Blalock could find an appropriate charge. During one hearing, Linda Davis became upset in the courtroom. Later, to attorney Blalock Lalk called to Blalock across the office, "If she [Linda Davis] doesn't like it, tell that bitch to get that boy [Davis Jr.] back here." Lalk repeated the statement twice more (across the DA's office, in front of office staff). *ROA 35 p. 323. Second Amended Pleadings. ROA 90 p. 656-9.*

On May 27, 1997, the day of the trial, prosecutors initiated a plea bargain with the letter offering terms supposedly mailed to months earlier: five years' probation for Davis Sr. and dismissal of charges against Linda Davis in return for Davis Sr.'s guilty plea and statement of guilt, acknowledging the threat to Mrs. Davis' employment due

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[6] Police nor prosecutors have never explained the logic of what the purpose of a "false paper trail" would serve detailing travel weeks, if not months before Davis Jr. actually jumped bond. Nor have they explained why one would sign his own name to create a trail, or give credit card numbers and receipts that would prove who was there.

to any conviction and Mrs. Davis' precarious mental health. Due to Mrs. Davis' previous suicide attempts, Mr. Davis agreed to the plea. *ROA 90 p. 56-57, 60-61.*

Judge Delaney accepted the plea and suggested deferred adjudication; ADA Lalk reneged on the plea deal, demanding jail time, based on the statement that in five years the evidence and witnesses against Davis Jr. would be lost. Court documents reveal that Judge Delaney dismissed the charges against Linda Davis *sua sponte* based on lack of evidence and her husband's statement under oath that she did not participate or have knowledge of any crime. Lalk is quoted in the media that Judge Delaney dismissed charges based on the "lack of any convincing evidence that she knowingly participated in any crime." *ROA 90 p. 657, 661; ROA 92 p.673.*

Judge Delaney sentenced Davis Sr. to 180 days in jail and 5 years probation. The 180-day sentence was to be suspended if conditions of probation were met. Those conditions were: 1) Both parents must participate in a broadcast on *America's Most Wanted* begging their son to return, including the specific statement that Mr. Davis would have to serve 180 days in jail; 2) Both parents must submit to interviews with local media; 3) Both parents must submit to questioning by law enforcement at any time; and 4) Davis Sr. must continue to cooperate with law enforcement in locating Don Jr. and share any information with or without their specific request.

On the court record Judge Delaney suggests a polygraph, not to Davis Sr.'s guilt, but the whereabouts of his son. DPS officer Hullom states that a polygraph would be invalid because of the medications Davis Sr. took for high blood pressure and depression. Judge Delaney states that if Davis Sr. meets the conditions stipulated in the probation agreement, he will suspend the 180-day sentence. The

judge then schedules a meeting for June, 1997 to verify the stipulations have been met. *ROA 90 p. 658; ROA 92 p. 673-4, 679.* After the probation agreement was typed and signed on court NCR forms, the polygraph requirement was added in handwriting. This addition was then included in the typed probation agreement filed at the Brazos County Dept. of Community Supervision. Judge Delaney signed this agreement, adding in handwriting "as requested by law enforcement." *ROA 90 p. 657; ROA 92 p. 673,676.*

Probation officer David Watkins explained the policy of the department as recommending early release from probation after 1/3 of the time served, the only conditions being that: 1) there must not have been any probation revocations; and 2) the financial obligations (court costs and fine) paid in full. *ROA 85 Testimony*, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.*
Two days later, the Davises made the required videos for national broadcasts. Agent Johnson and UPD director Wiatt questioned the Davises, supervised the taping, and monitored all questioning by the media. At the end of taping, Wiatt states before all including the media that he will demand a polygraph. *ROA 85 Testimony*, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings. ROA 90 p. 657; ROA 92 p. 680-81.*

Agent Johnson set up the polygraph at the FBI's main offices in Houston. The unnamed agent administering the test states, in the presence of Johnson, Lindholm, Blalock that he is not qualified to interpret the test results. Agent Johnson says that "the people in Washington can allow for the medication." The agent administering the test interrogated Davis Sr. for 2-3 hours in an adversarial manner(outside presence of Blalock). Only at the conclusion of this interrogation did the agent hook up the polygraph equipment and pose questions not answered to the agent's satisfaction in the earlier questioning.

At the conclusion of the test, the agent tells Davis Sr. that there "seems to be a problem" with the answer to one vague question regarding whether anyone has had contact with his son. The agent then reports to Lindholm, in the presence of Johnson and Blalock, that it appeared to be false. *ROA 35 p. 323 Second Amended Pleadings, ROA 95 p. 709.* Before the June 1997, agent Johnson informs attorney Blalock that the FBI will not submit any report; no polygraph tapes or analysis were ever presented.

In June 1997 the scheduled meeting with Judge Delaney convened in chambers outside the presence of Davis Sr. Present were Blalock, DA Bill Turner, DPS officer Hullom, and Detective Lindholm, who presented a written report they had prepared regarding the polygraph results. It is unknown if the results had been reviewed. This "report" had not been supplied to Blalock before the hearing, and Judge Delaney denied Blalock's request to read it. Judge Delaney pointed out that the polygraph results were termed "inconclusive"; DA Turner insisted that such polygraph results were "good enough" to require Davis Sr. to serve the 180-day sentence until such time as Davis admitted to the knowledge of his son's whereabouts or convinced David Hullom that he was telling the truth. *ROA 90 p. 658; ROA 92 p. 673, 679.*

Blalock requested play back of the tape of the plea hearing including the statements that polygraph results would be invalid, and Judge Delaney's statement to suspend sentence if Davis Sr. met the stipulations set. Judge Delaney refused, responding that since Don Jr. did not turn himself in, Davis Sr. had not fulfilled Delaney's requirements. Blalock asserted that, due to the mental health of Linda Davis and the physical and mental health of Davis Sr., incarceration would be inappropriately harsh. DA Turner then threatened to have both Davises committed to a mental institution if Judge Delaney refused to jail Davis Sr, to "go

upstairs right now and type the [commitment] papers." Judge Delaney's final ruling is that Davis Sr. must serve the 180-day sentence beginning June 20, 1997 and must continue to submit to interrogation as deemed needed by law enforcement. *ROA 90 p. 657-8; ROA 92 p. 673, 679, 682.*

Media accounts quote Lindholm as stating the polygraph results prove Davis Sr. was lying and had lied to police before. Judge Delaney was quoted as saying the polygraph had no effect on his ruling. Referring to the assaults Davis Jr. was accused of, Lindholm takes credit that "finally someone will begin to pay for these crimes." In August 1997, Judge Delaney denies release due to Davis Sr. having a heart attack in jail, with ADA Lalk assertion that Davis Sr. "flunked the polygraph." *ROA 90 p. 658; ROA 92 p. 674, 678-9, 682.*

While in jail, Davis Sr. is interrogated regularly by Lindholm and Hullom, without remission and without attorney, questioning the whereabouts of Davis Jr. and threatening Davis Sr. with perjury charges due to his steadfast inability to help locate his son. *ROA 92 p. 677, 682.*

In February 1998, the Davises were again featured on *America's Most Wanted* in connection with the just-discovered arrest of Don Jr. as a homeless person in Detroit in 1997. The Davises were not notified when the FBI discovered this information, nor were they notified in advance of the broadcast. Linda Davis testified that when Agent Johnson contacted them immediately thereafter to question them, the agents made it clear that they believed that the Davises knew where Davis Jr. was. Linda Davis testified that she and her husband were from then afraid that the FBI would declare them to be uncooperative in violation of the conditions of probation. *ROA 85*

Testimony, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.*

In March-May of 1999, Davis Sr. completes 1/3(22 months) of his sentence, pays his fine in full, and verifies all conditions of probation per his Houston probation officer. The BCCSD, contradicting its stated policy, refused to make recommendation or even forward a statement of compliance to Judge Delaney, based on the "nature" of Davis Sr.'s crime. In February 2000, the BCCSD again refuses to review Davis Sr.'s case or make recommendation requested by Davis Sr.'s Houston probation officer. *ROA 90 p. 57-58, 60-61.*

On October 31, 2000 Davis Jr. is captured in Cleveland, Ohio. Believing his capture removed any continuing threat of retaliation against her or her husband, Linda Davis made repeated attempts to have state officials investigate the Defendants' improper conduct. All refused. *ROA 85 Testimony*, Linda Davis, Appellants' Brief Appendix; *ROA 35 p. 323. Second Amended Pleadings.* On May 7, 2001 the Davises filed *pro se* the instant suit. *ROA 1 p. 9.*

On May 22, 2001, after pleading guilty to two charges, Davis Jr. was sentenced to 99-years confinement in prison. On May 25, 2001 Davis Jr. was visited in jail by Lindholm, seeking to interrogate Davis Jr. about the events of the past six years. Davis Jr. agreed, on condition that the interrogation be tape-recorded. Over several hours, Lindholm and Davis Jr. discussed all facets of the case, including the prosecution of Davis Jr.'s parents. Lindholm admitted to Davis Jr. that Lindholm and Hullom's "theories" of the case against the parents had been wrong. *ROA 90 p. 657-8; ROA 92 p. 680, 683.*

Less than one hour later, Davis Jr. was transferred to the courtroom for a hearing convened with Defendant ADA

Doug Howell and a colleague, purportedly regarding Davis Jr.'s active appeal. Davis Jr.'s attorney was contacted by conference call. The prosecutors brought Lindholm in. Howell explained to the court that Howell had learned of the illegal interrogation, and gave the only copies of the tapes to the court. The court proposed to take possession of the tapes and seal them. Howell and his colleague direct the court to "destroy" or "erase" the tapes. The court asked Davis Jr.'s counsel if that was all right, to which counsel acceded. Following counsel's lead, Davis Jr. consented, immediately questioning pending charges. The court ordered the tapes of the interrogation to be destroyed. *ROA 35 p. 323. Second Amended Pleadings.*

On July 27, 2001 the same court held a Motion for New Trial hearing where Davis Jr.'s appellate counsel prepared a Bill of Exception regarding the illegal interrogation of May 25. Davis Jr. testified to what occurred. ADA Howell objected repeatedly, but did not inform the court of the potential that the testimony was material to the federal case at bar in which ADA Howell was a co-defendant. Facts referenced, *ROA 35 p. 323. Second Amended Pleadings; Reporter's Record; transcripts accepted by the trial court.* Don Davis Sr. completed every day of his 5 year probation and was released in May, 2002.

US Court of Appeals for the Fifth Circuit
Case Summary

Court of Appeals Docket #: 03-20541
Filed: 5/29/03
Nsuit: 2440 Civil Rights: Other
Davis, et al v. Brazos County Texas, et al
Appeal from: Southern District of Texas, Houston

Lower court information:
District: 0541-4 : H-01-CV-1613
Ordering Judge: David Hittner, US District Judge

3/1904 Case calendared for oral argument. [03-20541] (sme)

4/21/04 Record on appeal returned to 5CCA. Volumes: 1 (Vol. #4 only) [03-20541] (cpd)

4//28/04 Case calendared without oral argument. Ctrm. Deputy: Shirley [03-20541] (sme)

5/6/04 No Oral Argument heard. [03-20541] (sme)

5/10/04 Opinion filed. Mandate pull date is 7/1/04. [03-20541] (rmf)

5/10/04 Judgment entered and filed. [03-20541] (rmf)

6/21/04 Extension granted by phone until: 7/1/04 to file petition for rehearing for Appellant Don R. Davis, Appellant Linda Louise Davis. [03-20541] (pac)

6/24/04 Petition filed by Appellant Don R. Davis, Appellant Linda Louise Davis for rehearing. # of copies filed: 4 [4873635-1] Mandate pull date canceled. Date of COS 6/23/04 Sufficient [Y/N]: Y [03-20541] (jtr)

7/13/04 COURT Order filed denying petition for rehearing. [4873635-1] Mandate pull date is 7/20/04. Copies to all counsel. [03-20541] (jtr)

FRAP 34. ORAL ARGUMENT

(a) In General.

(1) **Party's Statement.** Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28(h) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal

or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) Nonappearance of a Party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

FIFTH CIRCUIT RULE 34

34.1 Docket Control. *In the interest of docket control, the chief judge may from time to time appoint a panel or panels to review pending cases for appropriate assignment or disposition under this rule or any other rule of this court.*

34.2 Oral Arguments. *Oral argument is governed by Fed. R. App. P. 34. Cases not set for oral argument are placed on the summary calendar for decision. The clerk will calendar the oral argument cases based upon the court's calendaring priorities. Counsel for each party must present*

oral argument unless excused by the court for good cause. The oral argument docket will show the time the court has allotted for each argument. If counsel for all parties indicate that oral argument is not necessary under paragraph .3 of this rule, the case will be governed by Fed. R. App. P. 34(f).

34.3 Submission Without Argument. *A party desiring to waive oral argument in a case set for oral argument must file a motion to waive argument at least 7 calendar days before the date set for hearing.*

34.6 Continuance of Hearing. *After a case has been set for hearing, the parties or counsel may not stipulate to delay the hearing. Only the court may delay argument for good cause shown. Engagement of counsel in other courts ordinarily is not considered good cause.*

34.10 Submission Without Argument. *When a case is placed on the oral argument calendar, a judge of the court has determined that oral argument would be helpful. Therefore, requests of the parties to waive oral argument are not looked upon with favor, and counsel may be excused only by the court for good cause. See 5th Cir. R. 34.3.*

If appellant fails to appear in a criminal appeal from conviction, the court will not hear argument from the United States..

I.O.P. - Screening - Screening is the name given to the method used by the court to determine whether cases should be argued orally or decided on briefs only. This is done under Fed. R. App. P. and 5th Cir. R. 34.

(A) The judges of the court screen cases with assistance from the Staff Attorney. When the last brief is filed, a case is generally sent to the Staff Attorney for prescreening classification. If the staff attorney concludes

that the case does not warrant oral argument, a brief memorandum may be prepared and the case returned to the clerk. The clerk then routes the case to 1 of the court's judges, selected in rotation. If that judge agrees that the case does not warrant oral argument, the briefs, together with a proposed opinion, are forwarded to the 2 other judges on the screening panel. If any party requests oral argument, all panel judges must concur that the case does not warrant oral argument, and also in the panel opinion as a proper disposition without any special concurrence or dissent. If no party requests oral argument, all panel judges must concur that the case does not warrant oral argument. However, absent a party's request for oral argument, summary disposition may include a concurrence or a dissent by panel members.

(B) If the staff attorney concludes that oral argument is required, the case is sent to an active judge for screening. If the screening judge agrees, the case is placed on the next appropriate calendar, consistent with the court's calendaring priorities. If the screening judge disagrees with the recommendation for oral argument, that judge's screening panel disposes of the case under the summary calendar procedure.

Decision Without Oral Argument - When all panel members agree that oral argument of a case is not needed, they advise the clerk the case has been placed on the summary calendar. The court's decision usually accompanies the notice to the clerk.

Court Year Schedule - The clerk prepares a proposed court schedule for an entire year which is approved by the scheduling proctor and chief judge of the court. The court schedule does not consider what specific cases are to be heard, but only sets the weeks of court in relation to the

probable volume of cases and judge power availability for the year.

Judge Assignments

Panel Selection Procedure - Based on the number of weeks each active judge sits and the number of sittings available from the court's senior judges, and visiting circuit or district judges, the scheduling proctor and clerk create panels of judges for the sessions of the court for the entire court year. The judges are scheduled to avoid repetitive scheduling of panels composed of the same members.

Separation of Assignment of Judges and Calendaring of Cases - The judge assignments are made available only to the judges for their advance planning of their workload for the forthcoming court year. To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated.

Preparation and Publishing Calendars

General - The clerk prepares calendars of cases under calendaring guidelines established by the court. Calendars are prepared for the number of sessions (usually between 3 and 5) scheduled for a month. Information about the names of the panel members is not disclosed within the clerk's office until the calendars of cases for the month are actually prepared so that briefs and other materials can be distributed.

Calendaring by Case Type - The clerk balances the calendars by dividing the cases evenly among the panels by case type so that each panel for a particular month has more or less an equal number of different types of litigation for consideration.

Preference Cases - The categories of cases listed in 5th Cir. R. 47.7 are given preference in processing and disposition. To assist the clerk in implementing this rule, any party to a civil appeal or review proceeding requiring priority status should notify the clerk and cite the statutory support for the preference.

Non-Preference Cases - All other cases are calendared for hearing in accordance with the court's "first-in first-out" rule. Unless the court assigns special priority the oldest cases in point of time of availability of briefs are ordinarily calendared first for hearing.

Calendaring for Convenience of Counsel - For the New Orleans sessions, cases with non-local lawyers are scheduled in the first positions on the calendar whenever possible for their convenience in making departure accommodations.

Number of Cases Assigned - Unless special provision is made, a regular session of a panel of the court will hear 5 cases per day for 4 days, Monday through Thursday.

Advance Notice - The court seeks to give counsel 60 days advance notice of cases set for oral argument.

Forwarding Briefs to Judges - Immediately after formally issuing the calendar the clerk sends the panel members copies of the briefs for the cases set on the calendar.

Pre-Argument Preparation - The judges invariably read all briefs prior to oral argument.

Identity of Panel - The clerk may not disclose the names of the panel members for a particular session until 1 week in advance of the session.

FRAP 40. PETITION FOR PANEL REHEARING

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) **Contents.** The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) **Answer.** Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) **Action by the Court.** If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule

provides otherwise, a petition for panel rehearing must not exceed 15 pages.

FIFTH CIRCUIT RULE 40

40.1 Copies. *Four copies of all petitions for rehearing shall be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or order required by 5th Cir. R. 35.2.10, the party does not have to attach a copy to the petition for panel rehearing.*

40.2 Limited Nature of Petition for Panel Rehearing. *A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not used for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only.*

40.3 Length. *See Fed. R. App. P. 40(b).*

40.4 Time for Filing. *The clerk must receive a petition for rehearing within the time prescribed in Fed. R. App. P. 40(a).*

I.O.P. - Necessity for Filing - It is not necessary to file a petition for rehearing in the court of appeals as a prerequisite to filing a petition for certiorari in the Supreme Court of the United States.

FIFTH CIRCUIT RULE 35

35.1 Caution. *Counsel are reminded that in every case the duty of counsel is fully discharged without filing a*

petition for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a). As is noted in Fed. R. App. P. 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of Fed. R. App. P. 35(b)(1). The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under, inter alia, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.

I.O.P. Petition for Rehearing En Banc

Extraordinary Nature of Petitions for Rehearing En Banc - A petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent, subject to the following: Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc.

The Most Abused Prerogative - Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. Fewer than 1% of the cases decided by the court on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DON R. DAVIS, SR. and
LINDA L. DAVIS,
Plaintiffs

v.

FBI SPECIAL AGENT
ROBERT JOHNSON, et.al.,
Defendants

ENTERED
APR 01, 2003
Michael N. Milby
Clerk of Court

Civil Action
No. H-01-1613

ORDER

Pending before this Court is Defendant Robert Johnson's Motion to dismiss and for Summary Judgment on Plaintiffs' Bivens claims (Instrument No. 4). Having considered the motion, submissions, applicable law, evidence presented at a hearing on this matter, and arguments of counsel, the Court determines that Defendant Johnson's motion should be granted.

Introduction

Plaintiffs Don R. Davis, Sr. (Davis Sr.) and Linda L. Davis brought this Bivens suit against FBI Special Agent Robert Johnson (Johnson) alleging that he violated their constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments during a fugitive investigation.

Because Plaintiffs' cause of action accrued prior to April 1998, and this lawsuit was not filed until May 2001, Plaintiffs' claims are now barred by the two year statute of limitations. Plaintiffs' arguments for equitable

tolling of the statute based upon "duress" and "mental incapacity" are not sustainable under prior precedents and the evidence presented.

Alternatively, because Johnson is a federal employee and was acting within the course and scope of his employment; and Plaintiffs' Second Amended Complaint does not allege specific conduct on his part that shows that he clearly violated their constitutional rights or that he was plainly incompetent, he is protected from this lawsuit by the doctrine of qualified immunity.

Background and Facts

On August 23, 1996, Don R. Davis, Jr. (Davis Jr.), son of Plaintiffs, failed to appear for a preliminary hearing in connection with charges that he sexually assaulted two girls on the campus of Texas A&M University.[1] At the time he disappeared, Davis Jr. had been on bond living with Plaintiffs.

On September 11, 1996, after a vehicle registered to Plaintiff Linda Davis was found at a location near the Little Rock, Arkansas airport, at the request of the State of Texas, the FBI initiated an Unlawful Flight to Avoid Prosecution (UFAP) investigation into Davis Jr.'s disappearance. Johnson was assigned to that investigation.

On September 12, 1996, the Brazos County DA's Office indicted Plaintiffs on State charges for hindering the apprehension and prosecution of a felon. On that

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[1] These facts are taken from Plaintiffs' Second Amended Complaint (Instrument No. 35), and the Personal Declaration of Johnson, attached to Johnson's memorandum of law in support of his motion to dismiss and for summary judgment. Evidence presented at the oral hearings held in connection with the motions to dismiss filed by all of the Defendants did not controvert the basic contents of Johnson's Personal Declaration.

same day, a federal UFAP arrest warrant for Davis Jr. was issued.

On October 25, 19996, Plaintiffs were arrested and jailed at the Brazos County Courthouse on the State charges. That same day, Johnson went to Brazos County Jail to interview Davis Sr. Davis sr. requested an attorney and Johnson immediately terminated the interview.[2]

On May 28, 1997, Davis Sr. pled guilty to the State charges of hindering the apprehension and prosecution of a felon. Johnson was not at the plea hearing and he did not participate in the plea negotiations. At that time, as part of the plea agreement, the State dropped the charges against Plaintiff Linda Davis, In June of 1997, Davis Sr. received a sentence of five years of probation, which included approximately 180 days of incarceration.

In accordance with the plea agreement, Davis Sr. was required to take a polygraph examination and appear on the television show "Americas Most Wanted" to ask Davis Jr. to surrender himself.

On June 9, 1997, just prior to the taping of "Americas Most Wanted," Davis Sr. met with Johnson. Linda Davis and the Davis's attorney, Mr. Price Blalock, were also present. Davis Sr. was asked if he had any additional information on the whereabouts of his son, to which he replied that he did not. Mr. Blalock was present during this entire interview.

The following week, on June 16, 1997, pursuant to the plea agreement, Davis Sr. was polygraphed by FBI

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[2] In Plaintiffs' response to Johnson's motion to dismiss (Instrument No. 12), Plaintiffs address the meeting between Davis Sr. and Johnson as an "attempted interview." (See bottom of page 3.) This corroborates that Johnson terminated the interview after Davis Sr. requested an attorney.

SA Davis Sparks. Again, Davis Sr. Was accompanied by his attorney, Mr. Price Blalock. Johnson was also there. Davis Sr. refused to be interviewed after the polygraph exam.

The last contact Johnson had with both Davis Sr. and Linda L. Davis was on April 17, 1998, after Johnson learned that Davis Jr. had been arrested and then released in Dearborn, Michigan, earlier that year in January 1998. Mr. Price Blalock, the Davis's attorney, was at that meeting. During that meeting, Davis Sr. informed Johnson that he had not heard form his son Davis Jr. since his son had failed to appear in Court on August 23, 1996.

Davis Jr. was eventually located and arrested. He pled guilty to two counts of aggravated sexual assault prior to trial in late May 2001. He has been sentenced to two ninety-nine year terms in a state penitentiary.

Plaintiffs initially filed this lawsuit on May 14, 2001. In their Second Amended Complaint, filed April 26, 2002, they allege violations of their rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments, 18 U.S.C. §§ 241, 242, and 42 U.S.C. § 1983 arising from their dealings with State officials during the fugitive investigation. Plaintiffs demand judgment against all Defendants named in this lawsuit in the amount of $25,000,000.00 and costs. Plaintiffs allege, inter alia, that Johnson attempted to coerce witnesses against them; attempted to coerce a confession from Davis Sr.; caused a polygraph requirement to be added to Davis Sr.'s plea agreement; and caused an inconclusive polygraph to be interpreted as failing.

Defendant Johnson argues that because the conduct giving rise to the Bivens claims against him occurred no later than April 1998, those the claims are barred by the two-year statute of limitations and should be dismissed pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure. In the alternative, Defendant Johnson asserts that he is protected from this lawsuit by qualified immunity because the claims arise from objectively reasonable actions he took within the course and scope of his employment as a federal employee. Johnson also argues that Plaintiffs' allegations are broad and conclusory, and do not specify facts sufficient to establish that he did in fact violate Plaintiffs' constitutional rights. Johnson argues that Plaintiffs' claims are subject to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In response to Johnson's Motion to Dismiss and for Summary Judgment on Plaintiffs' Bivens claims, Plaintiffs argue for equitable tolling of the limitations period based upon "duress" and "mental incapacity," and contend that Johnson's conduct during the fugitive investigation was not "objectively reasonable."

A. Limitations

Under Bivens, an individual may sue a federal agent for money damages when the agent allegedly violates the individual's constitutional rights. See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). "[A] Bivens-type action against federal agents is controlled by the applicable state statute of limitations." Alford v. United States, 693 F.2d 489, 499 (1982)(affirming the holding in United Klans of America v. McGovern, 621 F.2d 152 (5th Circ. 1980)). Looking to the applicable Texas statute, the Fifth Circuit has determined that the statute of limitations for Bivens claims is two years. See Brown v. Nationsbank Corp., 188 F.3d 579 (5th Circ. 1999); Pena v. United States, 157 F.3d 984 (5th Circ. 1998).

Accrual of the limitations period begins when "the plaintiff knows or has reason to know of the injury which is the basis of the actions." Burrell v. Newsome,

883 F.2d 416, 418 (5th Circ. 1989). See also, Mendoza V. Lynaugh, 989 F.2d 191 (5th Circ. 1993).

In their Complaint, Plaintiffs allege various acts on the part of Johnson in violation of their constitutional rights, the latest of which allegedly took place in April 1998. Certainly then, by April 1998, Plaintiffs would have known of their injuries, and their cause of action would have accrued by that date. Because they filed this lawsuit in May 2001, more than three years after the accrual of their cause of action, their lawsuit is barred by the two year limitations period. [3]

Plaintiffs argue that the limitations period should be equitably tolled because their prosecution by the State constituted duress rendering them afraid to file and/or their prosecution rendered them mentally incompetent and unable to file. Plaintiffs bear the burden of presenting evidence sufficient to justify tolling the limitations period. See Blumberg v. HCA Mgmt.Co., 848 F.2d 642 644 (5th Circ. 1998).

Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. Black's Law Dictionary, 5th Edition (1979). In the instance case there is no evidence that Johnson threatened any harm, physical or otherwise, to Plaintiffs. Furthermore, there is no evidence that Davis Sr.'s incarceration was anything other than lawful. Finally, there is no link between duress, the conduct of Johnson,

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[3] Plaintiffs did argue that Davis Sr.'s cause of action would not have accrued until after he completed his five years of probation. This argument is specious. Assuming probation constitutes incarceration, Texas repealed its tolling provision for incarcerated inmates in 1987. See Ali v. Higgs, 892 F.2d 438, 439 (5th Circ. 1990).

and tolling. Even if Davis Sr. was afraid to file this lawsuit while on probation, for fear of revocation, these circumstances were unrelated to Johnson. Johnson was a federal employee, and Davis Sr.'s probation was a state matter. Johnson was uninvolved Davis Sr.'s supervision while he was on probation.

Plaintiffs also purport to qualify under the "unsound mind doctrine" of equitable tolling. Under this doctrine, the limitations period is tolled if a person's condition prevents him "from managing his affairs and thus from understanding his legal rights and action upon them." Hood v. Sears Roebuck & Co., 168 F.3d 231, 232 (5th Circ. 1999); Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996). In short, this doctrine protects individuals who either lack access to the courts or are unable "to participate in, control, or even understand the progression and disposition of their lawsuit. Wagner v. Texas A&M Univ., 939 F.Supp. 1297 S.D.Tex. 1996), citing Ruiz v. Conoco, Inc., 868 S.W.2d 752, 755 (Tex.1993).

In the instant case, the evidence presented by Plaintiffs indicates that they had the mental capacity to manage their affairs and understand their legal rights. Linda Davis testified that after the State charges against her were dropped that she did return to her job teaching school. She also testified that she managed the household while her husband was incarcerated and after his release. She also testified that she and her husband were both involved in a legal dispute concerning their home. The State court's acceptance of Davis Sr.'s guilty plea casts further doubt upon his claim of unsound mind.

B. Qualified Immunity

When the evidence in a case reveals no genuine issue as to any material fact and indicates that the moving party is entitled to judgment as a matter of law, summary judgment shall be rendered. Fed.R.Civ.P. 56(c); Celotex

Corp. v. Catrett, 477 U.S. 317 (1986). Usually, a court deciding a motion for summary judgment must review the facts drawing all inferences most favorable to the non-moving party. Celotex, supra. In a motion for summary judgment based upon qualified immunity, however, this standard is modified to favor the movant. Ellis v. Wynalda, 999 F.2d 243, 246 (7th Cir. 1993).

This modified standard has been adopted for the public policy reasons articulated by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982): "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Id. at 814. Deciding the issue of immunity by summary judgment avoids subjecting government officials to the costs of trial and the burden of discovery. Hunter v. Bryant, 502 U.S. 224, 227-28 (1991); Mitchell v Forsyth 472 U.S. 511, 526 (1985).

Once a motion for summary judgment has been properly made, the nonmoving party bears the burden of showing the existence of a genuine issue for trial. Celotex at 322-23. This burden cannot be discharged by offering vague allegations and legal conclusions, but instead must make a sufficient showing of an essential element of the case. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990); Salas v. Carpenter, 980 F.2d 299, 304 (5th Circ. 1992).

When deciding a motion for summary judgment based upon qualified immunity, the court must determine "whether the agent acted reasonably under the settled law in the circumstances...." Hunter v. Bryant, 502 U.S. 224, 228 (1991). In Harlow, the Supreme Court set forth an objective test for determining whether government officials being sued for allegedly violating a person's civil rights are entitled to qualified immunity for their discretionary actions. The Court determined that if the

official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," that official may not be held liable in a civil suit for damages. Harlow at 818.

In Kipps v. Caillier, 197 F.3d 765 (5th Circ. 1999), the Fifth Circuit adopted a three-part test which a plaintiff must satisfy in order to establish that a defendant is entitled to qualified immunity: (1) The court must first determine whether the plaintiff has alleged the deprivation of a constitutional right at all. (2) Next, the court must determine whether that right was clearly established at the time of the alleged violation. (3) Finally, the court must determine whether the record either shows that the alleged violation occurred, or that it at least gives rise to a genuine issue of material fact as to whether it occurred. The lack of specificity in Plaintiffs' pleadings precludes determination of whether or not any act of Johnson violated any constitutional rights.

It is not enough for a plaintiff to simply allege a violation of abstract rights: "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635 (1987). The plaintiff has the burden of demonstrating that the government "official's allegedly wrongful conduct violated clearly established law." Pierce v. Smith, 117 F.3d 866, 872 (5th Circ. 1997). Thus, whether a person asserting qualified immunity is liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law. Anderson at 636. Unspecified, broadly phrased claims, as presented in Plaintiffs' Second Amended Complaint, have been rejected by the Court: "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine it is clearly established." Wilson v. Layne, 119 S.Ct. 1692, 1699-1700 (1999).

All government officials are protected by immunity unless (1) they are plainly incompetent or (2) knowingly violate the law. Malley v. Briggs, 475 U.S. 335, 341 (1986). A government official protected by qualified immunity is to be given the benefit of any legal doubt. See Elliot v. Thomas, 937 F.2d 338, 341 (7th Cir. 1991). If a reasonable officer could find that the defendant's actions were justified, summary judgment should be granted. Ellis at 246.

In their Second Amended Complaint, Plaintiffs make several unspecified, broad-sweeping allegations of constitutional violations, but fail to articulate which of Johnson's actions they consider to be in violation of which rights. Despite Plaintiffs' failure to link a specific act of Johnson to a specific cause of action, Johnson would show the Court that all of his actions in relation to the Davis fugitive investigation were objectively reasonable and within the course and scope of his official employment as a FBI Special Agent.

Johnson entered the Davis investigation on September 11, 1996, at the request of the District Attorney's Office in Bryan, Texas. Working with the DA's Office, Johnson secured a warrant for the arrest of Davis Jr. from Magistrate Judge Milloy.

The charges filed against, and the arrest and detention of, Plaintiffs were all conducted by the State. Johnson did meet with Davis Sr. briefly upon his arrest, but terminated that meeting upon Davis Sr.'s request for an attorney. As a state matter, Johnson had no involvement in the plea agreement. Johnson was present during the administration of the polygraph, but did not interpret the results. Johnson did not interview neighbors, friends, or coworkers of the Davis's [sic].

In connection with the investigation of Plaintiffs, and their son, Johnson acted in accordance with FBI standard procedures and the investigation proceeded

consistent with those procedures. Plaintiffs' Second Amended Complaint fails to establish that Johnson acted unreasonably at any time, or that he acted outside the scope of his employment at any time during the investigation. In fact, the evidence indicates that every time Johnson met with Plaintiffs, their attorney, Price Blalock was present, with the exception of the one meeting at Brazos County Jail. On that occasion, Johnson terminated the interview as soon as Davis Sr. requested an attorney. Plaintiffs acknowledge this fact by calling this interview an "attempted interview" in their pleadings.

Considering that Plaintiffs' Second Amended Complaint fails to allege specific non conclusory facts showing that Johnson violated their clearly established constitutional rights through objectively unreasonable conduct, they cannot overcome Johnson's entitlement to qualified immunity. Furthermore, Plaintiffs' Second Amended Complaint does not allege any specific conduct on the part of Johnson showing that he was plainly incompetent or that he knowingly violated the law. Again, Plaintiffs cannot overcome Johnson's entitlement to qualified immunity. Accordingly, the Court hereby

ORDERS that Defendant FBI Special Agent Robert Johnson's Motion to Dismiss and for Summary Judgment on Plaintiffs' Bivens Claims (Instrument No. 4) is GRANTED. Plaintiffs' claims against Defendant Special Agent Robert Johnson are DISMISSED.

SIGNED at Houston, Texas, on this the 31 day of March 2003.

Signed by David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DON R. DAVIS, SR. and
LINDA L. DAVIS,
Plaintiffs

v.

BRAZOS COUNTY, TEXAS, et.al.,
Defendants

ENTERED
APR 02 2003
Michael N. Milby
Clerk of Court

Civil Action No.
H-01-1613

ORDER

Pending before the Court is Defendants John Delaney, Thomas Davis, David Hullum, Ray Bowen, Robert Wiatt and James Lindholm's Motion for Judgment on the Pleadings (Instrument No. 44). Having considered the motion, submissions on file, the oral hearings, and applicable law, the Court determines that the motion should be granted.

I. Factual Background

Plaintiffs Don R. Davis, Sr. and Linda L. Davis are the parents of Don R. Davis, Jr., who was arrested in 1996 for the sexual assault of two individuals on the Texas A&M campus in College Station, Texas. On August 23, 1996, Davis, Jr. failed to appear for a preliminary hearing on the criminal charges. Officials were subsequently unable to locate him for approximately four years.[1] At the time of his

[1] Davis Jr. was eventually found in Ohio, arrested and extradited to Texas to stand trial on the two sexual assault charges. In May 2001, the same month this lawsuit was filed, he pled guilty to two counts of aggravated sexual assault, and was sentenced to two ninety-nine year terms in the state penitentiary.

disappearance, Davis, Jr. had been released on bond and was residing with Plaintiffs.

Following an investigation, the Brazos County District Attorney's Office sought and obtained indictments against both Plaintiffs for hindering apprehension and prosecution of a felon. On October 25, 1996, Plaintiffs were arrested and placed in the Brazos County jail. Ultimately, charges were dropped against Linda Davis while Don Davis, Sr. pled guilty on May 28, 1997. In June of 1997, he received a five-year probated sentence, which included approximately five months' incarceration in the Brazos County Jail.

II. Plaintiffs' Lawsuit and Allegations

Plaintiffs filed this suit on May 14, 2001, asserting causes of action under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.Code Section 1983, U.S.Code Title 18 Sections 241-242, and Texas common law. Plaintiffs have since amended their pleadings to add causes of action under the Texas Code of Criminal Procedure and Texas Penal Code.[2] Plaintiffs demand judgment against all Defendants named in this suit for $25,000,000, and costs.

Plaintiffs make numerous allegations against each of the Defendants urging the instant motion.[3] Plaintiffs allege that

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[2] Because no cognizable civil causes of action arise under the Texas Code of Criminal Procedure, the Texas Penal Code, or sections 241-242 of Title 18, see *Hanna v. Home Insurance Co.*, 281 F.2d 289, 303 (5th Circ. 1960), this Order only addresses Plaintiffs' claims under section 1983 and Texas common law. All causes of action under the Texas Code of Criminal Procedure, the Texas Penal Code, and sections 241-242 of Title 18 are dismissed.

[3] This Court previously ordered Plaintiffs to amend their complaint in light of Defendants' initial motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs complied by filing their second amended complaint. Pursuant to a subsequent, Order Plaintiffs also filed a Rule 7(a) Reply to the Defendants' assertion of qualified immunity.

while Defendant John Delaney, a state district judge, presided over their criminal charges he (1) ordered Don Davis, Sr. to submit to polygraph testing as a condition of probation; (2) misrepresented the conditions under which a favorable sentence would be granted to Don Davis, Sr.; and (3) had actual or constructive knowledge of coercive tactics used against Don Davis, Sr. by the prosecutors to procure his guilty plea.

Plaintiffs also claim that Defendants Davis Hullum and James Lindholm, two state law enforcement officers, committed numerous unconstitutional and tortuous acts during their investigation and participation as witnesses in Plaintiffs' prosecutions. Specifically, Plaintiffs allege that Hullum and Lindholm (1) presented false or questionable evidence to the grand jury against Plaintiffs; (2) visited potential grand jury witnesses at inappropriate times and places; (3) sat in grand jury proceedings while the prosecutors presented their case; (4) represented Don Davis Sr.'s purportedly inconclusive polygraph result as false; and (5) frequently interrogated Don Davis, Sr. without his attorney present between June and November 1997. In addition to these claims, Plaintiffs also accuse James Lindholm of making false statements about them to the press and illegally interviewing their son after his apprehension and prosecution.[4]

Finally, Plaintiffs bring a number of claims against certain Defendants in their supervisory capacities. Plaintiffs allege that Defendants Bowen and Wiatt insufficiently supervised Lindholm. Plaintiffs complain that Dr. Bowen, as university president, declined their 2001 request to investigate Lindholm. Likewise, Plaintiffs have sued Col. Davis for declining their 2001 request to investigate

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Therefore, Plaintiffs' second amended complaint and Rule 7(a) Reply currently constitute Plaintiffs' live pleadings.

[4] Don Davis, Jr. is not a party to this lawsuit, nor do Plaintiffs purport to bring claims on his behalf in this lawsuit.

Hullum. Plaintiffs also accuse Wiatt of urging the district court to require Davis, Sr. to undergo a polygraph and participating in publicizing the Davis' prosecution during 1997.

III. Defendants' Motion for Judgment on the Pleadings

In the instant motion, Defendants move for judgment pursuant to Federal Rule of Civil Procedure 12 (c) for failure to state a claim upon which relief may be granted. *See Delta Truck & Tractor v. Navistar Int'l Transport Corp.*, 833 F.Supp. 587, 588 (W.D.La. 1993); 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1368 (2nd Ed. 1990 & Pamphlet 1999) at 441 n. 34. In addition to their respective assertions of various immunities from suit, Defendants also urge dismissal based upon applicable statutes of limitations.

To survive a motion to dismiss based upon the pleadings, the plaintiff must allege facts, not conclusory allegations, to outline the cause of action. See *Kjellvander v. Citicorp*, 156 F.R.D. 138, 141 (S.D.Tex 1994)(citing *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Circ. 1992) Although the court must accept all well-pleaded factual allegations as true, the court is not bound by legal characterizations the plaintiff attributes to or infers from the facts. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Circ. 1982), cer denied, 459 U.S. 1105 (1983)). A complaint that shows relief to be barred by an affirmative defense, such as the statute of limitations, may be dismissed for failure to state a cause of action. *Id.*

A. Statute of Limitations

Because there is no specified federal statute of limitations for section 1983 suits, federal courts borrow the forum state's general personal injury limitations period. *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Circ. 1989).

The staute of limitations in Texas for section 1983 claims is two years. *Mendoza v. Lynaugh*, 989 F.2d 191, 1193 (5th Circ. 1993). While the limitations period is determined by reverence to state law, the standard governing the accrual of a cause of action under section 1983 is determined by federal law. *Burrell*, 883 F.2d at 418. Accrual of a cause of action under section 1983 begins when the plaintiff has knowledge of the injury that forms the basis of the action. *Mendoza*, 989 F.2d at 193.

In the instant case, Plaintiffs were first arrested in October 1996 and charges against each of them had been resolved, in one way or another, by June 1997 when Don Davis, Sr. received his sentence following entry of a guilty plea. When false arrest and imprisonment claims are essentially part of a broader claim alleging a malicious prosecution conspiracy, as in the instant case, a cause of action for false arrest and imprisonment accrues at the same time as the cause of action for malicious prosecution. *Brandley v. Keeshan,* 64 F.3d 196, 199 (5th Circ. 1995). Therefore, Plaintiffs' claims under § 1983 have been barred by limitations since some time in June of 1999 at the latest.

Malicious prosecution, false arrest, and false imprisonment may also be asserted as pendent claims under Texas tort law. See *Kjellvander*, 156 F.R.D. at 143; *Brandley*, 64 F.3d at 199. To the extent Plaintiffs seek to assert these causes of action as pendent torts, they are precluded for the same reasons. Texas' one year limitations period for asserting malicious prosecution claims makes Linda Davis' cause of action even more untimely as a pendent tort than as a section 1983 claim. See § 16.002(a) TEX.CIV.PRAC. & REM. CODE (West Group 2002). To the extent false arrest and false imprisonment may be distinguishable from malicious prosecution under state law, they are nevertheless barred in this action by the general 2-year statute of limitations for personal injury actions. See §§

16.002(a), 16.003, TEX.CIV.PRAC. & REM. CODE (West Group 2002).

The same two year limitations period would also apply to Plaintiffs' asserted claims of negligence, gross negligence, intentional infliction of emotional distress, official oppression, abuse of process and conspiracy. *Id.* Plaintiffs' defamation claims are subject to the same one year limitations period as malicious prosecution. See §16.002 TEX. CIV. PRAC. & REM. CODE (West Group 2002). Therefore, Plaintiffs have failed to state any claim for relief which could have been timely asserted as of May 14, 2001 when they initiated this lawsuit.

Plaintiffs have failed to plead any tolling doctrine which can overcome Defendants' limitations defense. They cite Don Davis, Sr.'s five year sentence of probation as a basis for tolling. Assuming *arguendo* that a probated sentence would qualify as incarceration, the Texas tolling provision for incarcerated plaintiffs was repealed in 1987, well before the underlying events of this lawsuit occurred. See *Ali v. Higgs,* 892 F.2d 438, 439 (5th Circ. 1990).

Plaintiffs have also asserted duress as an excuse for their delay in filing suit, but have failed to sufficiently plead or otherwise identify for this Court any specific threat or action undertaken by any Defendant from which Plaintiffs could reasonably conclude the existence of duress. *See Kaiser Aluminum*, 677 F.2d at 1056. The mere anticipation of duress fails as a matter of law. Id. at 1057; See also *Pierce v. Haverlah's Estate*, 428 S.W.2d 422 (Tex.Civ.App.-Tyler 1968, writ ref'd n.r.e.). Further, even if Plaintiffs had identified a sufficient threat made by a particular Defendant, such duress could not inure to Plaintiffs' benefit as against all other Defendants. *Slater V. Nat'l Med. Enter., Inc.*, S.W.2d 228, 235 (Tex.App-Fort Worth 1998, rev.denied).

Additionally, both Plaintiffs purport to qualify under the unsound mind tolling doctrine. Under Texas law, the statute

of limitations is suspended for those under legal disability. §16.002TEX.CIV.PRAC. & REM. CODE (West Group 2002). This provision protects plaintiffs who either lack access to the courts or are unable "to participate in, control, or even understand the progression and disposition of their lawsuit." *Wagner v. Texas A&M Univ.* 939 F.Supp. 1297, 1317 (S.D.Tex. 1996), citing *Ruiz v. Conoco*, Inc. 868 S.W. 2d 752, 755 (Tex.1993). An "unsound mind" generally is considered equivalent to insanity or incompetency, though an individual need not be adjudicated insane or incompetent to warrant protection. Id. (citing *Hargraves v. Armco Foods, Inc.* 894 S.W.2d 546, 547 (Tex.App.-Austin 1995, no writ)). Neither of Plaintiffs have shown themselves to be incapable of managing their affairs or understanding their legal rights or disabilities. See *Helton V. Clements*, 832 F.2d 332, 336 (5th Circ. 1987). Linda Davis has admitted to this Court that she continued her job teaching school during the period in question and that she and her husband were both involved in a legal dispute concerning their house during this period. The state court's acceptance of Don Davis, Sr.'s guilty plea casts further doubt upon his claim of unsound mind. Even Linda Davis' brief hospitalization could not arguably toll the limitations period for more than the short number of days that she remained in the hospital.

B. Defendants' Immunities from Suit

Defendant John Delaney claims an entitlement to absolute judicial immunity from this lawsuit. Judicial immunity can only be overcome when a judge either takes nonjudicial actions, i.e. actions taken outside his judicial capacity, or acts in the complete absence of all jurisdiction, *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Mere allegations that a judge acted upon a bribe or as part of a conspiracy will not be sufficient to overcome this immunity. *Holloway v. Walker,* 765 F.2d 517, 522 (5th Circ. 1985), *citing Sparks v. Duval Ranch Co.,* 604 F2d 976 (5th Circ. 1979)(en banc), *aff'd sub. nom Dennis v. Sparks*, 449 U.S.

24 (1980); see also *Brandley*, 64 F.3d at 201. Plaintiffs' complaints against Judge Delaney relate entirely to acts or omissions taken by him in his judicial capacity. Nothing in Plaintiffs' pleadings suggest that Judge Delaney acted without any jurisdiction at all. Accordingly, Defendant Delaney is entitled to absolute judicial immunity from this suit.

As state government officials, Defendants Davis, Hullum, Bowen, Wiatt, and Lindholm have asserted their entitlement to qualified immunity from Plaintiffs' claims. Government employees are presumptively to the defense of qualified immunity, and once the defense is asserted, the burden shifts to the plaintiff to show that it does not bar his recovery. *Salas V. Carpenter*, 980 F.2d 299, 305 (5th Circ. 1992). A plaintiff must satisfy a three-pronged test in order to overcome the defense of qualified immunity. *Eugene v. Alief Independent School District*, 65 F.3d 1299, 13-5 (5th Circ. 1995). First a plaintiff must show a violation of a constitutional right. Second, the plaintiff must show that the right was clearly established at the time of the incident in question. Finally, the plaintiff must show that the Defendants' actions were objectively unreasonable. *Id.* A plaintiff bringing a civil rights action must state particular facts specifying the personal involvement of each defendant. *Fee v. Herndon*, 900 F.2d 804 (5th Circ.) *cert. denied,* 498 U.S. 908 (1990). Personal involvement is an essential element of a civil rights cause of action. *Thompson v. Steel*, 709 F.2d 381, 382 (5th Circ. 1983).

In the instant suit, Plaintiffs have not met their burden of alleging a violation of a constitutional right by any of these Defendants to the degree of specificity required of section 1983 claims. See *Reyes v. Sazan*, 168 F.3d 158 (5th Circ. 1999); *Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991 (5th Circ. 1995). Plaintiffs have failed to allege sufficient personal involvement by Dr. Bowen, Col. Davis, or Robert Wiatt in their prosecutions. There mere fact that

these individuals supervised other Defendants does not crate liability under section 1983. "Well settled Section 1983 jurisprudence establishes that supervisory officials cannot be held vicariously liable for the subordinates' actions." *Mouille v. City of Live Oak, Texas*, 977 F.2d 924, 929 (5th Circ. 1992). Instead, "[supervisory officials may only be held liable if: (i) they affirmatively participate in acts that cause constitutional deprivation; or (ii) implement unconstitutional policies result in plaintiff's injury." *Id.* In the instant case, Plaintiffs only complain that these officials failed to investigate or more closely supervise their subordinates. A general allegation of administrative negligence does not amount to a claim cognizable under section 1983. *Rizzo v. Goode,* 423 U.S. 362, 370-77 (1976); *Alton v. Texas A&M Univ.,* 168 F.3d 196, 201 (5th Circ. 1999).

Plaintiffs have alleged that Defendants Hullum and Lindholm were both directly involved in their prosecutions. Nevertheless, neither Plaintiff has stated a cognizable claim under section 1983. Plaintiffs' second amended complaint indicates that Don Davis, Sr.'s conviction was never reversed or otherwise terminated in his favor. A claim for damages brought by a convicted plaintiff which necessarily implies the invalidity of the plaintiff's criminal conviction is not cognizable under section 1983 unless the conviction has been invalidated. *Heck v. Humphrey* 512 U.S. 477, 486-87 (1994). It is the Plaintiffs' burden to establish that the prosecution has favorably terminated. See *Brandley*, 64 F.3d at 199. Because any section 1983 claim for malicious prosecution asserted by Don Davis, Sr. would necessarily imply the invalidity of his conviction for hindering the apprehension and prosecution of a felon, he is precluded from claiming a constitutional violation arising from the facts alleged in Plaintiffs' complaint.

Although charges against Linda Davis were ultimately dropped, she is also precluded from bringing a malicious

prosecution claim under section 1983. Plaintiffs' pleadings indicate that her release was part of a bargain for Don Davis, Sr.'s guilty plea. When the dismissal of a criminal prosecution is brought about by a compromise, or quid pro quo exchange, favorable termination of a criminal prosecution cannot be established. See *Evans v. Ball*, 168 F.3d 856, 859-60 (5th Circ. 1999); Compare *Izen v. Catalina*, 256 F.3d 324 (5th Circ. 2001) with *Evans*, supra; *Taylor v. Gregg*, 36 F.3d 453 (5th Circ. 1994); and *Pete v. Metcalfe*, 3 F.3d 214 (5th Circ. 1993).

The remaining allegations brought by Linda Davis against Hullum and Lindholm are not sufficient to establish a violation of her constitutional rights. Linda Davis accuses these two Defendants of submitting a witness' affidavit to the grand jury which contained false statements about her son's whereabouts in another state. She also contends that these statements were controverted by more than one grand jury witness. Even assuming *arguendo* that Lindholm or Hullum presented this affidavit with malice, it is unclear how this particular information was a necessary or sufficient cause of her indictment. Further as state witnesses and investigating officers, Hullum and Lindholm's mere presence in the grand jury room during the presentation of the prosecutors' case was permissible under Texas law. See TEX.CODE CRIM. PROC. ANN. Art. 20.011(a)(4). Finally although Linda Davis asserts a conspiracy claim against Hullum and Lindholm for the violation of section 1983, a conspiracy itself is not actionable under section 1983. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 186 (5th Circ. 1990).

To the extent Plaintiffs have sued these Defendants in their official capacities, the Defendants are immune under the Eleventh Amendment. The Eleventh Amendment acts as a jurisdictional bar to suit against a state in federal court. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Warnock v. Pecos County, Texas*, 88

F.3d 341, 343 (5th Circ. 1996). Because a suit brought against a state official in his official capacity is in reality, asserted against the state itself, such suits are also barred by the Eleventh Amendment. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Howlett v. Rose*, 496 U.S. 356, 365-66 (1990).

For each of the reasons addressed herein, Plaintiffs' claims are barred by limitations and the Defendants' immunity from suit. Accordingly, the Court hereby

ORDERS that Defendants John Delaney, Thomas Davis, David Hullum, Ray Bowen, Robert Wiatt, and James Lindholm's Motion for Judgment on the Pleadings (Instrument No. 44 is GRANTED. Plaintiffs' claims against Defendants John Delaney, Thomas Davis, David Hullum, Ray Bowen, Robert Wiatt, and James Lindholm are DISMISSED in their entirety.

SIGNED at Houston, Texas on this the 31 day of March, 2003.

Signed by David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DON R. DAVIS, SR. and
LINDA L. DAVIS,
Plaintiffs
v.
BRAZOS COUNTY, TEXAS, et.al.,
Defendants

ENTERED
APR 02 2003
Michael N. Milby
Clerk of Court

Civil Action
No. H-01-1613

ORDER

Pending before the Court is Defendants Brazos County, Texas, County Judge Alvin Jones, County Commissioners Court, Bill Turner, Individually and as District Attorney, Douglas Howell, Individually and as Assistant District Attorney, Margaret Lalk, Individually and as Assistant District Attorney, and Department of Community Supervision's[1] Motion to Dismiss for Failure to State a Claim (Instrument No. 38), and any amendments or supplementation thereto. Having considered the motion, submissions in response, applicable law, evidence before the Court, and the arguments of the parties, the Court determines that the motion should be granted.

Statement of the Case and Applicable Procedural History

On May 14, 2001, Plaintiffs filed their Original Complaint alleging causes of action under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution for alleged violations of their due process rights in criminal prosecutions brought against them. Plaintiffs also brought a

[1] Hereinafter referred to as Brazos County, County Judge Alvin Jones, Bill Turner, Douglas Howell, Margaret Lalk, and Department of Community Supervision, unless otherwise noted.

cause of action under U.S. Code Title 18. In response thereto, Defendants filed their Original Answer on July 23, 2001, which specifically denied Plaintiffs' allegations and asserted the affirmative defenses of statute of limitations, Laches, *Res Judicata*, Collateral Estoppel, sovereign immunity, official immunity, and qualified immunity. On August 13, 2001, Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction, or, in the alternative, for judgment on the pleadings. On December 10, 2001, Defendants filed a Motion to Dismiss for Failure to State a Claim.

Pursuant to the Court's March 27, 2002, Order, Plaintiffs' attorney of record filed Plaintiffs' Second Amended Original Complaint on April 26, 2002. Plaintiffs' Second Amended Original Complaint alleged causes of action under the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S.Constitution for alleged violations of Plaintiffs' due process rights in criminal prosecutions brought against them. Plaintiffs' Second Amended Original Complaint also asserted causes of action under 42 U.S.C. § 1983, 18 U.S.C. §§ 241, 242, Title 18 U.S.C. Part II, the Texas Code of Criminal Procedure, and the Texas Penal Code, as well as pendant state law claims.

On May 2, 2002, Defendants Brazos County, County Judge Alvin Jones, Bill Turner, Douglas Howell, Margaret Lalk, and Department of Community Supervision filed their Second Amended Original Answer to Plaintiffs' Second Amended Original Complaint. Therein, Defendants specifically denied Plaintiffs' allegations. Defendants also asserted the affirmative defenses of affirmative defenses of statute of limitations, Laches, *Res Judicata*, Collateral Estoppel, sovereign immunity, governmental immunity, judicial immunity, prosecutorial immunity, official immunity, and qualified immunity. On May 6, 2002, Defendants filed a First Supplemental Motion to Dismiss

for Failure to State a Claim upon which relief could be granted.

On July 16, 2002, Plaintiffs filed a response to Defendants' First Supplemental Motion to Dismiss for Failure to State a Claim. Therein, Plaintiffs argued that the statute of limitations for the claims asserted by Plaintiffs was tolled because Plaintiffs "were each rendered of unsound mind." On August 30, 2002, Plaintiffs filed a First Amended Reply to Defendants' First Supplemental Motion to Dismiss for Failure to State a Claim. In this Reply, Plaintiffs attempted to incorporate the factual averments made in their Original Complaint into their Second Amended Complaint, which was devoid of any facts to support their alleged causes of action. Plaintiffs also reiterated their argument that the statute of limitations was tolled on their causes of action because they allegedly suffered from a disability and/or were imprisoned, as well as contending that they were of unsound mind, in accordance with Tex. Civ. Prac. & Rem. Code § 16.001[2]. Plaintiffs also contended that Defendants were not entitled to immunity.

On January 10, 2003, the court rejected Plaintiffs' contention that it was the Court's and/or Defendants' duty to piece together Plaintiffs' multiple submissions in order to show that Plaintiffs satisfied the requisite pleading standards to avoid dismissal of their claims. The Court ordered Plaintiffs to file a Rule 7 (a) Reply that specifically alleged the conduct each individual public official engaged in or failed to engage in that deprived Plaintiffs of a constitutionally protected right. Moreover, the Court ordered that Plaintiffs' Reply to Defendants' assertions of

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[2] Imprisonment is no longer considered a legal disability in Texas. See Burrell v. Newsome, 883 F.2d 416, 418 (5th Circ. 1989), citing Acts 1987, 70th Leg., Ch. 1049, 56; Tex.Civ.Prac.Rem Code § 16.001.

qualified immunity be filed on or before noon on January 21, 2003. Plaintiffs filed the respective replies by the deadline, however, their reply was not sufficient to defeat Defendants' assertions of qualified immunity.

On November 15, 2002, a partial hearing was held on Defendants' respective Motions to Dismiss but was continued at the direction of the Court.[3] On November 19, 2002, the Court set a hearing for January 27, 2003, on the pending motions. During the January 27, 2003, hearing, Plaintiffs' physician, Dr. Edward McReynolds, testified that Plaintiff Don Davis, Sr. was treated by him for depression. Plaintiffs failed to present evidence that they were of "unsound mind" and/or that they suffered a mental disability sufficient to toll the statute of limitations. During the time frame Plaintiffs contend the statute of limitations should be tolled, they were dealing with other legal matters concerning probate, repossession of their home, and their son's criminal trial; Plaintiff Don Davis, Sr. was working; and Plaintiff Linda Davis was teaching public school. Because Plaintiffs have failed to present sufficient evidence that the statute of limitations should be tolled on their theory of "unsound mind," and because Plaintiffs have failed to specifically allege the conduct each individual public official engaged in or failed to engage in that deprived Plaintiffs of the constitutionally protected right sufficient to overcome and said Defendants' Motion to Dismiss for Failure to State a Claim should be GRANTED.

42 U.S.C. § 1983 – Applicable Limitations Period

Plaintiffs have failed to overcome the affirmative defense of statute of limitations asserted by Defendants. Since there

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[3] The testimony offered by Linda Davis at the November 15, 2002, hearing was insufficient to enable the Court to find that she did not have the mental capacity to pursue litigation. She testified that she suffered from depression.

is no specified federal statute of limitations for 42 U.S.C. § 1983 suits, federal courts borrow the forum state's general personal injury limitations period. *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Circ. 1989) (citations omitted). The statue of limitations in Texas for 42 U.S.C. § 1983 claims is two years. *Mendoza v. Lynaugh*, 989 F.2d 191, 1193 (5th Circ. 1993). While the limitations period is determined by reference to state law, the standard governing the accrual of a cause of action under § 1983 is determined by federal law. *Burrell*, at 418. Accrual of a cause of action under 42 U.S.C. § 1983 begins when the plaintiff has knowledge of the injury that forms the basis of the action. *Mendoza*, at 193.

Plaintiffs" 42 U.S.C. § 1983 "Claims"

In this action, Plaintiffs assert claims under 42 U.S.C. § 1983 for violation of their constitutional rights by virtue of an investigation into their son's flight to avoid criminal prosecution. This investigation, which began in August of 1996, ultimately led to Plaintiffs' prosecution, the conviction of Don Davis, Sr. in May of 1997, and his sentencing the following month. A liberal construction of the alleged facts in Plaintiffs' complaint advocate 42 U.S.C. § 1983 causes of action for false arrest, false imprisonment or malicious prosecution. See *Wheeler v. Cowden Oil & Chemical Co.*, 734 F.2d 254, 260 (5th Circ. 1984).

When false arrest and false imprisonment claims are essentially part of a broader claim alleging a malicious prosecution conspiracy such as that alleged by Plaintiffs, then the causes of action for false arrest and false imprisonment accrue at the same time as the one for malicious prosecution. *Brandley v. Keeshan*, 64 F.3d 196, 199 (5th Circ. 1995); Casanova, 199 F.Supp. 2d at 650. A plaintiff's claim for malicious prosecution does not accrue until the underlying criminal proceeding terminates in the plaintiff's favor. *Heck v. Humphrey* 512 U.S. 477, 486-87

(1994). See also *Grummet v. Cable* 946 F.2d 1178, 1183, (5th Circ. 1991), *cert. denied*, 504 U.S.965 (1992).

Plaintiff Don Davis, Sr. has failed to state a claim for malicious prosecution[4] because he cannot show his prosecution terminated in his favor. Criminal charges are terminated in favor of the accused only when their final disposition indicates that the accused is not guilty. *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Circ. 1994). Proceedings terminate in favor of the accused only when they affirmatively indicate that he is not guilty. *Evans v. Ball*, 168 F.3d 856 (5th Circ. 1999). Nor can Don Davis, Sr. show that he was innocent of the charges brought against him because the record reflects a plea of guilty. Moreover, Don Davis, Sr.'s allegation in Plaintiffs' Second Amended Original Complaint that his probation was completed on April 30, 2002, does not toll the statute of limitations for these claims. Because Don Davis, Sr.'s claims for false arrest, false imprisonment, and malicious prosecution accrued when he pled guilty in May of 1997, and because he failed to have the conviction set aside, reversed on appeal, or otherwise terminated in his favor, he has failed to state a claim and those causes of action against Defendants should be dismissed as barred by the statute of limitations.

Plaintiff Linda Davis' claims for false arrest, false imprisonment, and malicious prosecution should also be dismissed. Linda Davis has testified before this Court that all charges against her were dropped when her husband pled guilty in May 1997. Linda Davis' § 1983 claims should have been filed no later than May of 1999. Thus, the claims

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[4] The elements of a malicious prosecution claim are: (1) the state commences a criminal prosecution against the plaintiff; (2) the defendants caused or aided the prosecution; (3) the prosecution terminated in plaintiff's favor; (4) the plaintiff was innocent; (5) the defendants acted without probable cause; (6) the defendants acted with malice; and (7) the criminal proceeding damaged the plaintiff. *See Kerr v. Lyford,* 171 F.3d 330, 340 (5th Circ. 1999).

she now alleges should be dismissed because those claims are barred by the statute of limitations.

Tolling of Statute of Limitations
Tex. Civ. Prac. & Rem. Code § 16.001

Despite the foregoing undisputed facts regarding Plaintiffs' alleged claims and the evidence presented at the November 15, 2002, and January 27, 2003, hearings before the Court, Plaintiffs contend that the statute of limitations is tolled by Tex. Civ. Prac.& Rem. Code § 16.001. Section 16.001 provides in part:

> (a) For the purposes of this subchapter, a person is under a legal disability if the person is:
>
> .....
>
> (2) of unsound mind.
>
> (b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.
>
> .....
>
> (d) A disability that arises after a limitations period starts does not suspend the running of the period.

See Tex. Civ. Prac. & Rem. Code § 16.001

Plaintiffs argue that the "unsound mind" exception tolls the statute of limitations for their claims against Defendants. Plaintiffs contend that their respective depressions constituted a legal disability, and the time period they allegedly suffered from this disability should not be included in the limitations period. This argument is

misplaced and is not sufficiently supported by the evidence, nor is it supported by the applicable law.

In order to prevail on an unsound mind tolling theory, Plaintiffs were required "to produce either (i) specific evidence that would enable the court to find that Plaintiffs 'did not have the mental capacity to pursue litigation' or (ii) a fact-based expert opinion to that effect." *Freeman v. Am. Motorists Ins. Co.*, 53 S.W. 3d 710, 713 (Tex.App.-Houston [1st Dist.] 2001, no writ), citing *Grace v. Colorado*, 4 S.W. 3d 765, 769 (Tex.App.-Austin 1999, pet. denied); see also *Porter v. Charter Med. Corp.*, 957 F.Supp. 427, 1438 (N.D.Tex. 1997)(applying Texas law; plaintiff has burden of proof regarding tolling of limitations.

The limitations period is tolled for persons of "unsound mind" to protect persons without access to the courts and to protect persons who are unable to participate in, control, or understand the progression and disposition of their lawsuit, *Ruiz v. Conoco*, Inc. 868 S.W. 2d 752, 755 (Tex.1993). There is no dispute that Plaintiffs had access to the courts during the time their alleged causes of action accrued. Nor do Plaintiffs allege that they were unable to participate in and control a lawsuit during the time they contend they suffered from a legal disability or that they were of "unsound mind." Instead, during the time they contend limitations should be tolled, Plaintiffs worked and participated in other legal matters concerning probate, the repossession of their house, and their son's criminal trial, even though they were suffering from depression.[5] As such,

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[5] Cf *Hargraves v. Armco Foods, Inc.* 894 S.W.2d 546, 547 (Tex.App.-Austin 1995, no writ)(limitations not tolled when plaintiff able to work and timely file workers' compensation claim during alleged period of unsound mind); see also *Helton v. Clements*, 832 F.2d 332, 336 (5th Circ. 1987)(psychological depression insufficient to toll limitations), citing Allen v. Powell's Int'l Inc., 518 P.2d 588, 589 (Ariz. 1974)(depression

Plaintiffs have failed to meet their burden of proof that they were of unsound mind sufficient to toll the applicable statute of limitations. Therefore, their causes of action against Defendants should be dismissed because those causes of action are barred by the statute of limitations.

Pendent State Tort Claims

Plaintiffs' claims for false arrest, false imprisonment, malicious prosecution, defamation, negligence, gross negligence, and intentional infliction of emotional distress brought as possible pendent state law claims –or as constitutional claims—should also be dismissed for failure to state a claim and because those claims are barred by the respective statute of limitations applicable to those claims. In Texas, claims for false arrest, false imprisonment, negligence, gross negligence, and intentional infliction of emotional distress have a two-year statute of limitations. Tex. Civ. Prac. & Rem. Code § 16.002 (a), 16.003. Claims for malicious prosecution and defamation in Texas have a one-year statute of limitations. Tex. Civ. Prac. & Rem. Code § 16.002 (a). Considering that the actions complained of by Plaintiffs in their Second Amended Complaint occurred more than two years prior to the filing of their complaint, this Court is of the opinion that the foregoing pendent state law causes of action alleged by Plaintiffs should be dismissed.

18 U.S.C. § § 241, 242, Title 18 of the U.S.Code, Texas Code of Criminal Procedure, and the Texas Penal Code

Plaintiffs' Second Amended Original Complaint also alleges claims against Defendants under 18 U.S.C. § § 241, 242, Title 18 of the U.S.Code, Texas Code of Criminal Procedure, and the Texas Penal Code, without pointing to

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insufficient to toll limitations when plaintiff carried out regular activities).

any specific violation in their Complaint. In Plaintiffs' responses to the previously filed Motions to Dismiss for Failure to State a Claim, they allege that these violations are predicated on violations of 18 U.S.C. § § 241, 242, Title 18 of the U.S.Code Part II, the Texas Code of Criminal Procedure, and the Texas Penal Code. This Court is of the opinion that no cause of action can be asserted for violations of said Rules or the Texas Penal Code. Plaintiffs have never cited any authority to support such causes of action. Moreover, Plaintiffs were not prosecuted in Federal Court for their criminal acts buy in Brazos County, Texas, in accordance with the laws of the State of Texas. As such, the claims asserted by Plaintiffs under 18 U.S.C. § § 241, 242, Title 18 of the U.S.Code, the Texas Code of Criminal Procedure, and the Texas Penal Code should be dismissed because Plaintiffs have failed to state a claim upon which relief can be granted.

Defendants' Immunities

Despite the opportunity provided by this Court to Plaintiffs on several occasions, Plaintiffs have failed to overcome the immunities asserted by Defendants Brazos County, County Judge Alvin Jones, Bill Turner, Douglas Howell, Margaret Lalk, and Department of Community Supervision. Each of these Defendants holds various immunities against Plaintiffs' claims. These include Eleventh Amendment immunity, sovereign immunity, governmental immunity, absolute judicial immunity, absolute prosecutorial immunity, official immunity, and qualified immunity. As such, for the following reasons, Plaintiffs' causes of action brought against Defendants are barred by the respective immunities asserted by Defendants.

Eleventh Amendment Immunity

With respect to Defendants Brazos County and Department of Community Supervision, the Eleventh Amendment acts as a jurisdictional bar to suit against the county governmental unit and the state and local

governmental agency in federal Court. See, e.g. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Warnock v. Pecos County, Texas*, 88 F.3d 341, 343 (5th Circ. 1996). Whether a particular governmental body is a state or local entity is a question usually addressed in the context of determining Eleventh Amendment immunity. See, e.g. *Minton v. St. Bernard Parish Sch.Bd.*, 803 F.2d 129, 131 (5th Circ. 1986). Local governmental units, such as Defendants Brazos County and Department of Community Supervision, may not be held liable under 42 U.S.C. § 1983 on a theory of *Respondeat Superior* for the actions of its employees.[6] *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). Similarly, supervisory officials may not be held vicariously liable under 42 U.S.C. § 1983 for the actions of their subordinates. *Leffal v. Dallas I.S.D.*, 28 F.3dd 521, 525 (5th Circ. 1994). Any claims against individual Defendants, such as Bill Turner, Douglas Howell, and Margaret Lalk, in their official capacity, will be treated as claims against the governmental entity involved. *Hafer v. Melo*, 502 U.S. 21(1991); *Baker v. Putnal*, 75 F.3d 190, 195 (5th Circ. 1996); see also *Howlett v. Rose*, 496 U.S. 356, 365-66 (1990). Accordingly, Defendants Brazos County, Commissioners Court and Department of Community Supervision are immune under the Eleventh Amendment to Plaintiffs' claims. Defendants County Judge Alvin Jones, Bill Turner, Douglas Howell, and Margaret Lalk are also immune to Plaintiffs' claims to the extent they are only sued in their official capacities. For those reasons, Plaintiffs' claims against said Defendants should be dismissed.

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[6] Plaintiffs' Second Amended Original Complaint alleges all of the acts and/or omissions of the state actors of the state agencies named as Defendants herein occurred in the course and scope of their employment. Therefore, not only are the state agencies not liable under 42 U.S.C. § 1983, but the state actors in their individual capacities are not liable.

Absolute Judicial Immunity

Plaintiffs have also failed to overcome the affirmative defense of absolute judicial immunity asserted by Defendant County Judge Alvin Jones. It is well established that a judge enjoys absolute immunity from liability for damages for judicial acts performed within his jurisdiction. *Hale v. Harney*, 786 F.2d 688, 690 (5th Circ. 1986). The doctrine of absolute judicial immunity protects judges from liability for all actions taken in their judicial capacities, so long as they do not act in clear absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991); *Mays v. Sudderth*, 97 F.3d 107, 110-111 (5th Circ. 1996). The doctrine of absolute judicial immunity protects judicial officers not only from liability, but also from suit. *Mireles*, at 11. "A judge's acts are judicial in nature if they are 'normally performed by a judge' and the parties affected 'dealt with the judge in his judicial capacity.'" *Boyd v. Biggers*, 31 F.3d 279 (5th Circ. 1994), quoting *Mireles*, at 12. All of the claims asserted by Plaintiffs against Defendant County Judge Alvin Jones were related to the alleged actions he took in his judicial capacity. Defendant County Judge Alvin Jones is therefore entitled to absolute judicial immunity. As such, Plaintiffs have failed to state a claim upon which relief can be granted against Defendant County Judge Alvin Jones and Plaintiffs' claims against him should be dismissed because those claims are barred by Judge Jones' absolute judicial immunity.

Absolute Prosecutorial Immunity

Plaintiffs have also failed to overcome the affirmative defense of absolute prosecutorial immunity asserted by Defendants Bill Turner, Douglas Howell, and Margaret Lalk. It is also well settled that prosecutors, such as those named Defendants, are entitled to absolute prosecutorial immunity. See *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976). The entitlement to absolute prosecutorial immunity flow from performance of activities that are intimately

associated with the judicial process, such as initiating and prosecuting a criminal case. *Id.* at 430. A prosecutor's absolute immunity will not be stripped because of action that "was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman,* 435 U.S. 349, 356-57 (1978). Although *Stump* addressed judicial immunity, "immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of Judges...." See *Kerr v. Lyford,* 171 F.3d 330, 340 (5th Circ. 1999), citing *Butz v. Economou,* 438 U.S. 478, 510 (1978).

All of the allegations made against Defendants Bill Turner, Douglas Howell, and Margaret Lalk (with the Brazos County District Attorney's Office) were intimately associated with the judicial process and the prosecution of Plaintiffs. These Defendants had jurisdiction to initiate and prosecute the criminal case against Plaintiffs, and they cannot be stripped of their absolute prosecutorial immunity, even if Plaintiffs contend their actions were allegedly taken in error, don maliciously, or in excess of their authority. As such, Plaintiffs' claims brought against these Defendants should be dismissed because they have failed to state a claim upon which relief can be granted and because those claims are barred by said Defendants' absolute prosecutorial immunity.

Qualified Immunity

Plaintiffs have also failed to overcome the qualified immunity asserted by Defendants County Judge Alvin Jones, Bill Turner, Douglas Howell, and Margaret Lalk. Government employees such as these Defendants are also presumptively entitled to the defense of qualified immunity, and once the defense is asserted, the burden shifts to the plaintiff to show that it does not bar his recovery. See *Salas v. Carpenter,* 980 F.2d 299, 305 (5th Circ. 1992); *Bennett v. City of Grand Prairie,* 883 F.2d 400, 408 (5th Circ. 1989).

Despite several opportunities afforded to Plaintiffs by this Court, they have failed to show that these Defendants' assertion of qualified immunity does not bar their recovery.

The appropriate standard for determining qualified immunity is the objective reasonableness of an official's conduct as measured by reference to clearly established law. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Bigford v. Taylor*, 896 F.2d 972, 974 (5th Circ. 1990). A plaintiff must satisfy a three-pronged test in order to overcome the defense of qualified immunity. *Eugene v. Alief Independent School District*, 65 F.3d 1299, 13-5 (5th Circ. 1995). A plaintiff must show a violation of a constitutional right, that the right was clearly established at the time of the incident in question, and that defendants' actions were objectively unreasonable. *Id.* A plaintiff fails to satisfy either of these requirements with conclusory allegations of wrongdoing. *Geter v. Fortenberry*, 849 F.2d 1550, 1553 (5th Circ. 1988). This Court finds that Plaintiffs' Second Amended Original Complaint is composed primarily of conclusory allegations such that it is insufficient to overcome the qualified immunity defense.

In evaluating an immunity defense to a constitutional claim, the court must first determine whether the plaintiff has alleged the violation of a constitutional right at all *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Plaintiffs have failed to establish that Defendants County Judge Alvin Jones, Bill Turner, Douglas Howell, and Margaret Lalk have allegedly violated any of their constitutional rights. All of their claims are based on general and conclusory allegations. Considering that Second Amended Original Complaint have failed to allege specific, non-conclusory facts showing that any of these Defendants violated either Plaintiffs' clearly established constitutional rights through objectively unreasonable conduct, they cannot overcome these Defendants' entitlement to qualified immunity. As such, Plaintiffs' claims against Defendants County Judge

Alvin Jones, Bill Turner, Douglas Howell, and Margaret Lalk in any capacity should be dismissed because Plaintiffs have failed to state a claim upon which relief can be granted and because they have failed to show that said Defendants' assertion of qualified immunity does not bar their recovery. Moreover, Plaintiffs have failed to satisfy the three-pronged test in order to overcome the asserted affirmative defense of qualified immunity.

Immunity under the Texas
Code of Criminal Procedure, Art. 42.20

In addition to the immunities discussed above, Defendants Brazos County, County Judge Alvin Jones, Bill Turner, Douglas Howell, Margaret Lalk, and Department of Community Supervision have also invoked the immunity provided by the Texas Code of Criminal Procedure, Art. 42.20. Article 42.20 provides immunity from liability for damages arising from an act or failure to act in connection with a program established under Chapter 42 of the Texas Code of Criminal Procedure. Community Supervision programs, such as the one complained of by Plaintiffs, have been established under Art. 42.12 of the Texas Code of Criminal Procedure. Moreover, it is not within the realm of the authority of the Department of Community Supervision to grant Don Davis, Sr. early release from the terms of his probation, nor are they required to recommend it. In fact, only the judge has the authority and jurisdiction to reduce or terminate the period of community supervision. [7] As such, Plaintiffs' claims regarding the allegation that Don Davis, Sr.'s community supervision was not terminated early should also be dismissed on the foregoing grounds and

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[7] The doctrine of absolute judicial immunity protects judges from liability for all actions taken in their judicial capacities, so long as they do not act in a clear absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991); *Mays v. Sudderth*, 97 F.3d 107, 110-111 (5th Circ. 1996).

because said Defendants are entitled to the immunity provided for by the Texas Code of Criminal Procedure, Art. 42.20. Accordingly, the Court hereby

ORDERS that Defendants Brazos County, Texas, County Judge Alvin Jones, County Commissioners Court, Bill Turner, Individually and as District Attorney, Douglas Howell, Individually and as Assistant District Attorney, Margaret Lalk, Individually and as Assistant District Attorney, and Department of Community Supervision's Motion to Dismiss for Failure to State a Claim (Instrument No. 38) is GRANTED.

SIGNED at Houston, Texas this 31 day of March 2003.

Signed by David Hittner
DAVID HITTNER
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DON R. DAVIS, SR. and
LINDA L. DAVIS,
Plaintiffs

v.

BRAZOS COUNTY, TEXAS, et.al.,
Defendants

ENTERED
APR 01 2003
Michael N. Milby
Clerk of Court

Civil Action
No. H-01-1613

FINAL JUDGMENT

As the Court has granted Defendants' Motion to Dismiss and for Summary Judgment (Instrument No. 4), Motion to Dismiss for Failure to State a Claim (Instrument No. 38), and Motion for Judgment on the Pleadings (Instrument No. 44) by separate order, the Court hereby

ORDERS that final judgment be entered in favor of Defendants. Plaintiffs' claims are dismissed. Plaintiffs Don R. Davis, Sr. and Linda L. Davis shall take nothing from Defendants. This is a FINAL JUDGMENT.

SIGNED at Houston, Texas on this the 31 Day of March, 2003.

Signed by David Hittner
DAVID HITTNER
United States District Judge